This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

**Usage guidelines**

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

**About Google Book Search**

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

This Book was the property of the late
J. R. Planché ("Somerset Herald" and
Author) and purchased by me at the Sale of
his Library by Puttick & C.
July, 1880.

EB
AH
XJ.

Horner, Thomas Strangeways

A

# REPORT of the CASE

OF

# *HORNER* againſt *LIDDIARD*,

UPON THE QUESTION OF

*What Conſent is neceſſary to the Marriage of Illegitimate Minors*;

DETERMINED,

on the 24th May 1799,

IN THE CONSISTORIAL COURT OF LONDON,

BY THE RIGHT HONOURABLE SIR WILLIAM SCOTT,
CHANCELLOR OF THE DIOCESE:

WITH

## AN INTRODUCTORY ESSAY

UPON THE THEORY AND THE HISTORY OF LAWS RELATING TO ILLEGITIMATE CHILDREN, AND TO THE ENCOURAGEMENT OF MARRIAGE IN GENERAL.

BY ALEXANDER CROKE, Eſq. LL.D.
ADVOCATE IN DOCTORS-COMMONS.

ΟΥΣΕ Η ΦΥΣΙΣ ΕΔΩΡΗΣΑΤΟ Ο ΝΟΜΟΣ ΑΓΝΟΕΙ ΩΣ ΜΗ ΚΑΤΑ ΤΗΝ ΑΥΤΟΥ ΤΕΧΘΕΝΤΑΣ ΠΡΟΑΙΡΕΣΙΝ. THEOPH.

LONDON:
PRINTED, BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,
FOR J. BUTTERWORTH, FLEET-STREET.
1800.

To

THE MOST REVEREND FATHER IN GOD,

# JOHN,

BY DIVINE PROVIDENCE,

## *LORD ARCHBISHOP OF CANTERBURY,*

PRIMATE OF ALL ENGLAND,

AND

METROPOLITAN,

&c. &c. &c.

# THIS REPORT

OF A CASE OF CONSIDERABLE CONSEQUENCE,

DETERMINED IN THE CHIEF CONSISTORIAL COURT

WITHIN HIS GRACE'S PROVINCE,

IS

RESPECTFULLY DEDICATED,

BY HIS GRACE'S

MOST HUMBLE

AND OBEDIENT SERVANT,

ALEXANDER CROKE.

Doctors-Commons,
21 March 1800.

# CONTENTS.

## THE INTRODUCTORY ESSAY,


PAGE

MOTIVES and Plan, – – – 1

I. THE THEORY, – – – 4

Beneficial effects of the intercourse between the Sexes —Propagation of the species—Mollifies their nature—Binds them to society—Calls forth their talents—Occasions them to look to the future—True foundation of laws and governments,

Only to be obtained by a permanent union, – 6

Which is most consonant to the human heart—Evils of promiscuous love—Particularly as to the offspring, 8

No security for that permanency in a state of nature, 9

Interference of laws--Institution of marriage, – 10

Impediments to marriage, – – – ib.

How to be counterbalanced, – – – 11

1. By rewarding marriage, – – 12

2. By discouraging celibacy, – – 13

3. By discouraging other connexions, – – 14

1. A promiscuous intercourse, – – ib.

2. Adultery, – – – 15

3. Concubinage, – – – 17

By direct punishments, – – 19

By disavowing them as to any legal effects, – ib.


II. THE

PAGE

II. THE PRACTICE, - - - 21

1. THE FIRST AGES, - - - ib.

2. THE JEWISH LAWS, - - - 22

Encouragement of marriage—Diſcouragement of celibacy—Concubinage allowed—Baſtards inherited—How far the conſent of their parents was neceſſary to marriage.

3. THE GRECIAN LAWS, - - 26

Spartan laws,

Athenian laws—Penalties of celibacy and rewards of marriage—Concubines—Who were baſtards—Their incapacities—Could not inherit—Not bound to maintain their parents—Parents could not bequeath beyond a certain ſum—Whether baſtards could be adopted—Caſe of Pericles, &c. &c.

4. THE ROMAN LAWS, - - - - 39

1. Encouragement of marriage, and penalties againſt celibacy, from the foundation of Rome, ib.

The Romans averſe from marriage—the reaſon, 42

Regulations by Julius Cæſar, - - - 45

By Auguſtus, - - - - 46

Lex Julia and Papia-Poppæa, - - ib.

The hiſtory of thoſe laws, - - ib.

Lex Papia-Poppæa—its contents, - - 49

Penalties upon celibacy, - - - 50

Who were liable to them, - - - 51

Other regulations, - - - ib.

Penalties removed in part by marriage, - - 52

Gradually and totally removed by children, - 53

Rewards for having children to free-born citizens, 54

To libertines, female patrons, ſlaves, and thoſe who had the *jus latinum*, - - 55

Other ſubſequent privileges, - - 56

The *jus liberorum*, - - - - 57

By whom granted, - - - 58

What it was—Extended—Perſons privileged, - ib.

Changes in the laws—Penalties of celibacy abolished by Conſtantine, - - 59

Other incapacities removed by Theodoſius, - 60

2. Laws

PAGE

2. Laws to diſcourage other connexions, – 61
Who were baſtards, – – 62
1. The children of prohibited marriages, – ib.
What marriages were prohibited, – – ib.
Not void till Antoninus, – 65
Changes in the laws of marriage, – – 66
2. The children of concubines, – – 68
Concubines permitted by law, – ib.
Laws relating to them, – – – 69
A doubt reſpecting an opinion of Heineccius, – – – – 70
Their rights, – – – 72
Aboliſhed by Leo, – – – 74
3. The children of promiſcuous and other irregular connexions.
Rights and incapacities of baſtards, – – 75
1. Before Conſtantine, – – – 76
Firſt principle, – – – ib.
No connexion with the father, – – ib.
Second principle, – – – 79
Connexion with the mother perfect, – ib.
As to her condition, – – – ib.
Her property, – – – 80
In other reſpects, – – 82
How far the conſent of parents was requiſite to their marriage, – – – 83
2. Changes introduced by Conſtantine, in their general condition, – – – 91
3. Subſequent alterations, – – – 92
4. Finally ſettled by Juſtinian, – – 93
Legitimation firſt introduced by Conſtantine, – 95
Six kinds
1. By marriage, – – – ib.
2. By the *oblatio curiæ*, – – – 97
3. By adoption, – – – 99
4. By the reſcript of the prince, – – 100
5. By the will of the father – – ib.
6. By nomination, – – – ib.
The introduction of legitimation oppoſed in the parliament of Merton, – – – 103

5. THE

PAGE

5. THE LAWS OF THE MIDDLE AGES, AND THE CANON LAW, – – – – 108
1. The hiſtory of concubinage in the Weſt, after the deſtruction of the Roman empire, – ib.
Originally not condemned by the church, – ib.
Nor by the laws in the Weſt, – – 113
Morganatic marriages, – – 115
Began to be condemned by the Pope and Councils without ſucceſs in the 10th and 11th centuries, – – – 118
Nicholas II. – – – 120
Hildebrand, – – – 121
Progreſs of the Roman church, – – ib.
Succeſs in Spain, Germany, France, Switzerland, Italy, and England, – – 125
Final abolition, – – – 128
2. Hiſtory of baſtards from the ſame period, – 129
Chaſtity of the German nations, – ib.
Baſtards deſpiſed, – – – ib.
Sovereigns and nobles aſſume privileges, – 131
Baſtards of ordinary rank, – – 132
Hiſtory of baſtards in France, – – 133
Firſt period—two firſt races, – – ib.
Second period—the third race, – – 136
Third, or modern period, Reign of Francis I. 137

III. THE COMPARISON, – – – 140
Superiority of the Britiſh laws.
The reaſon.

The CASE of HORNER againſt LIDDIARD, otherwiſe WHITELOCK, falſely calling herſelf HORNER, – – – 149

AN

# INTRODUCTORY ESSAY,

*&c. &c. &c.*

AS the following caſe is altogether new, and relates to a ſubject extremely important to the happineſs of many families, it was ſuggeſted to the Reporter, by ſome gentlemen of the profeſſion, whoſe wiſhes and opinions he muſt ever treat with the greateſt reſpect, that a correct repreſentation of it might not be an unacceptable preſent to the public. At their requeſt, therefore, he was induced to undertake a taſk, which demanded only ſome little care and fidelity in the performance. In the execution of his undertaking, he has to apologize to the learned advocates, who were engaged in the cauſe,

for the very imperfect manner, in which he has given their ingenious arguments. For, in truth, as the idea of publiſhing the caſe did not occur till after thoſe arguments were concluded, he had taken very ſhort and inſufficient notes of them. With reſpect to the elegant and maſterly ſentence of the court, he pledges himſelf to its being tolerably accurate.

A queſtion, in itſelf ſo material, and intereſting, very naturally drew his attention, at the ſame time, to conſider the ſubject more generally, and in other points of view. He was deſirous of aſcertaining with preciſion, the principles which have occaſioned laws to diſavow a relation, which exiſts in nature; and of inquiring into the regulations, which have been adopted by different nations, in regard to illegitimate children, and particularly by thoſe to whom we are moſt accuſtomed to look for examples of legal and political wiſdom. But his motive, in theſe reſearches, was not merely the gratification of an idle curioſity. In an unfortunate period,

riod, in which zealous attempts have been made to introduce a new ſyſtem of morality, which treats with contempt every inſtitution of antiquity, and which particularly directs its ridicule againſt the ſacredneſs of the nuptial bands, as ariſing from the prejudices of the vulgar; he thought that it might not be uſeleſs to ſhew, that the great uniformity, which has prevailed in moſt countries, and ages, in their notions upon this ſubject, is founded upon ſound maxims of ſenſe and reaſon. He imagined, likewiſe, that a compariſon of the laws of his own country with thoſe principles, and the practice of other nations, and times, would aſſiſt in determining how far, in this inſtance, they are juſtly entitled to the praiſes ſo often beſtowed upon them, or whether the partiality of Britons is the mere child of local vanity. In theſe inquiries, he is ſenſible that neceſſary profeſſional avocations have added to the imperfections, of which he ſhould, even otherwiſe, have been too conſcious.

I. The *Theory.*

Beneficial effects of the intercourſe between the ſexes.

The ſtrong paſſion implanted in mankind, of which the direct object is the continuation of the ſpecies, is attended with other effects ſo extremely beneficial, that they can ſcarcely be conſidered as ſecondary.

The intercourſe between the two ſexes inſenſibly corrects and mollifies whatever is brutal and ſavage in their nature. Under this powerful influence, ſelf-love, the main ſpring of all action, becomes enlarged and purified. No longer reflected back and confined, a ſullen, untractable principle, within the breaſt of an individual, it gradually expands till it comprehends the whole circle of exiſtence. It extends itſelf, firſt, to the object of his affections, and he learns the rudimental leſſon of benevolence, to feel and intereſt himſelf deeply in the welfare, or miſery, of another. The love of his offspring ſucceeds next; in proceſs of time, all the various relations and connexions, to which conſanguinity gives birth, are included; till, at length, the human heart, habituated to the ſofter feelings, becomes univerſally more

mild

mild and amiable in its diſpoſitions towards all the world.

In proportion to the number of thoſe, whoſe welfare is inſeparably connected with their own, men become intereſted in the well-being of the ſociety of which they form a part. No longer mere citizens of the world, they are united to one particular combination of men, and fixed to a particular ſpot. They acquire a partiality and an attachment even to the very land they inhabit, and are deſirous of promoting whatever may contribute to its proſperity. The domeſtic connexions, therefore, are a ſubſtantial pledge to the commonwealth for the performance of all the moral and ſocial duties.

The ſame motives call forth the exertion of their talents and induſtry. They wiſh to obtain property, honours, or fame, which may remain to their repreſentatives; and every exertion is a benefit to the ſociety at large.

It becomes their object to ſecure theſe advantages for poſterity. They are never inclined, therefore, to ſacrifice the future to the preſent; they look to ſolidity and duration in their proviſions. Governments and laws, with all their conſequences, neceſſarily follow. Hence this paſſion, in its effects, forms the trueſt and firmeſt baſis of all political eſtabliſhments, and even of civil ſociety itſelf.

Only to be obtained by a permanent union.

But none of theſe ends can be obtained by a promiſcuous intercourſe between the ſexes.

The natural hiſtory of the human race teaches us, that men may be multiplied moſt effectually by the permanent union of one male and one female; and that the relative numbers of the two ſexes will not, in theſe climates at leaſt, allow of a different proportion.

The affections, when not concentrated in one object, are diſſipated and weakened, and degenerate into a mere animal appetite.

Paternal

Paternal love will be ſtrongeſt where there are the feweſt doubts as to the reality of the relation.

If we conſult the human heart itſelf, we find, that a permanent union is moſt conſonant to its ſenſations and habits. Affections acquire ſtrength by time, and the bond of union becomes more firmly knit, by the mutual pleaſure, and common intereſt, which ariſes from parental love. The gay partaker in the joys of youth is willingly continued, as the friend and partner in the more ſerious purſuits of manhood, and as the comfort of old age.

The effects, too, of this paſſion, when not ſo reſtrained and limited, are as deſtructive as they are otherwiſe beneficial: when females are not appropriated, conteſts and diſcords of the moſt envenomed nature muſt perpetually take place. Theſe paſſions unreſtricted produce the greateſt depravity of mind and principle. The virtuous habits of pure love and conſtancy are no more obſerv-

able in the male ſex, whilſt the other is deprived of its greateſt ornaments, chaſtity and modeſty.

Particularly as to the offſpring.

The neceſſity of a permanent union is moſt ſenſibly perceived with reſpect to the offspring.

If the young of the human ſpecies were able to procure their own ſuſtenance as ſoon as thoſe of other animals; if, like them, they arrived, by the force of inſtinct only, at an early maturity, in all the powers of which their nature is capable, there would be no neceſſity, ſo far as they are concerned, for the continuance of the union between the ſexes much beyond the time of parturition. But ſince they are doomed to many years of weak and helpleſs infancy; ſince they are capable of acquiring habits uſeful to themſelves and their fellow-creatures; and ſince, under almoſt any ſtate of ſociety, a long courſe of education is neceſſary to call forth the latent energies of mind and body, and to communicate to youth the knowledge

ledge and experiences of age: theſe objects, ſo highly important to the happineſs of individuals, and of ſociety itſelf, can only be obtained by the joint cares of both parents, continually exerted, in a ſtate of permanent union.

But ſince theſe parental duties require the long and aſſiduous attentions of both father and mother, in their reſpective ſtations, to which no limitation of time can be affixed, it is evident that the object of the union itſelf cannot be attained, unleſs it be rendered perpetual, that is, for the life of the parties. For thoſe duties would be ill performed, if either parent could deſert them at pleaſure, and withdraw themſelves into other connexions.

In a ſtate of nature, there is no other ſecurity for the permanency of the connexion, than inclination, ſubject to all the influences of fickleneſs and caprice.

No ſecurity for that permanency in a ſtate of nature.

Poſitive

Inſtitution of marriage.

Poſitive laws interfere in this inſtance, as in many others, to ſupply the defects of that imperfect condition of man, if it ever could in fact ſubſiſt. They direct the forms by which the commencement of the union, and its diſſolution, ſhall be manifeſted to the world, and render more determinate its nature, duration, effects, duties, and obligations, both with reſpect to the parties themſelves, and their children. Marriage itſelf, therefore, is founded upon the paſſions of the body, and the affections of the mind; its permanency is eternally dictated by human reaſon, guided by the end, and object, for which thoſe paſſions and affections were created; and it receives its viſible ſhape, and features, from the varying conſtitutions of poſitive law.

Impediments to marriage.

But whatever may be the good to ſociety, and however agreeable this inſtitution may be to human nature, it can ſeldom be expected that individuals ſhould act upon ſuch general motives, where the benefit is remote,

and

and their particular intereſt, perhaps, not very diſtinguiſhable. In addition to the cares, duties, reſtraints, and anxieties of a family, many reaſons may operate upon different men to produce an averſion from marriage. The diſſipated cannot ſubmit to confine their pleaſures to a ſingle object; liberty, and the power of change, are grateful to all mankind. They whoſe feelings are too refined, and irritable, might tremble to entruſt their honor to the cuſtody of another perſon; and even prudence might ſometimes whiſper the hazard of entering into an engagement, which death only could terminate. Other objections would ariſe from the peculiar cuſtoms, manners, and habits of different countries; from the luxury, extravagance, and profligacy of women, or the intereſted adulation which was offered at the altar of childleſs wealth.

How to be counterbalanced:

Laws, therefore, would imperfectly perform their office, if they contented themſelves with regulating the forms and rights of marriage, without making any proviſions to

to counterbalance theſe impediments, and to induce men to enter into a ſituation, which has ſuch great influence upon the well-being of ſtates; unleſs they employed in this ſervice the two great engines of rewards and puniſhments, by which alone they can operate upon the human will.

The application of theſe powers muſt neceſſarily be either, *direct*, and conſiſt in *rewarding marriage*, and in *puniſhing celibacy*; or, *indirect*, in *diſcouraging all other connexions*.

1ſt, By rewarding marriage.

The rewards of marriage may be either poſitive, or negative. Actual bounties may be given to thoſe who are in that ſtate, or exemptions from the general burdens of the community. That married men ſhould be favoured in the impoſition of taxes, there is an additional reaſon, becauſe the neceſſary expences of a family render them leſs capable of paying them. The great value of their lives to that family makes it the more expedient that they ſhould not be expoſed to ſervices of danger.

Some

Some other conflicting principles interfere to reſtrain the ſeverity of laws againſt celibacy. Since, not only the choice of the object, but the queſtion whether a man ſhall marry or not, is ſo much a matter of private œconomy, and involves in it ſo deeply the happineſs of the individual, any thing like compulſion ſeems to interfere too much with the freedom of acting, according to the ſuggeſtions of prudence, which is ſo dear to every man in his domeſtic concerns. Though marriage may be, generally, a duty, the meaſure of obligation upon each individual muſt depend upon his peculiar circumſtances and ſituation; upon his wealth, or poverty; upon the health, and vigour, of his conſtitution; upon his habits of mind, purſuits, profeſſion, and avocations; and, after all, upon the opportunity of meeting with a ſuitable object. To enforce, therefore, by very harſh penalties, an obligation, imperfect at beſt, ſo various in its ſtrength, and of which the degree cannot be determined, ſo as to ſuit every caſe, ſeems to be an unwarrantable extenſion of penal legiſlation.

2dly, By diſcouraging celibacy.

The

The puniſhment therefore ſhould be almoſt wholly negative; they might be excluded from ſome of the privileges of married men, or, at moſt, the weight of public duties might fall ſomething heavier upon their ſhoulders; but to render them abſolutely incapable of ſerving their country, in honourable offices, or of enjoying property, which the induſtry of their anceſtors has acquired, or the benevolence of their friends is deſirous of beſtowing upon them, is certainly going a great deal too far.

3dly, By diſcouraging other connexions.

If men can gratify their paſſions without inconvenience by irregular connexions, they will be the leſs diſpoſed to incur the troubles of matrimonial life; and, on the other hand, if they are prohibited from unlawful amours, imperious love will neceſſarily impel them to the marriage bed.

1. A Promiſcuous intercourſe.

In the ſcale of theſe anomalies, an intercourſe abſolutely promiſcuous is highly deſerving of reprehenſion. It defeats almoſt every intention of the union of the ſexes. The

The powers of production are ineffectual, weakened, or deſtroyed. The tender affections have no time, or opportunity, to be matured, or to produce any effect. The parental connexion is annihilated by its uncertainty.

2. Adultery.

Perhaps the greateſt inducement to marriage which laws can hold out, is to ſecure, as far as may be in their power, an inviolable fidelity in the obſervance of the matrimonial engagement. It is impoſſible to conceive a more fatal obſtacle than the proſpect of a faithleſs partner, and an adulterous offſpring. Beſides, a violation of this duty, particularly on the part of the female, entirely fruſtrates every purpoſe of the conjugal union, and produces all the miſchiefs of promiſcuous love, with increaſed malignity. In conſidering a vice, which thus deſtroys the very roots of the domeſtic ſociety, and prevents, or defeats, the moſt beneficial of civil eſtabliſhments, if we add to the account, what indeed do not properly form any part of the preſent diſquiſition,

the incalculable miſeries inflicted upon the unhappy individuals concerned, upon the huſband, the wife herſelf, and the children, it would be difficult, in the whole catalogue of human enormities, to diſcover a crime more hateful in its nature, and more deſtructive in its conſequences. The ſtrength of the paſſions, and the frailty of human nature, which in ſome caſes may plead for a mitigation, upon this head are an additional reaſon for the increaſed ſeverity of puniſhments. There are ſcarcely any other crimes, either againſt the perſon, or property of others, which men are not deterred from committing by other reſtraints than thoſe which the laws impoſe. Murder and acts of cruelty, are oppoſed by the ſympathy, and benevolent inſtinct, which even all animals feel for their fellow-creatures; robbery, and ſimilar offences, have ſomething mean, and odious, in their very idea; but adultery is a miſapplication of paſſions which are good in themſelves; in a corrupt ſtate of manners, falſe notions of honour may prevail, and opinion may conceal much of its real deformity. To

counter-

counterbalance ſtrong temptations, thus reinforced, powerful motives muſt be applied, which may completely overbear and determine the mind; and laws cannot be conſidered as exceeding the bounds of humanity, if they even unſheath the avenging ſword.

3. Concubinage.

Next to theſe, is concubinage, or the union, ſomething more than temporary, of one man with one woman. This ſtate has always had its advocates, and plauſible arguments have been advanced to prove it to have all the advantages and effects of marriage itſelf. But a queſtion, ſimilar to the injunction of St. Ambroſe, quoted in the Canon Law, will ever ſuggeſt itſelf. "If "your connexion differs from marriage, in "the duration, or other reſpects, it cannot "fulfil the purpoſes of marriage; if it does "not differ in ſubſtance, why not add the "ceremony?" In a ſtate of nature, this

[a] Mulier tua, ſi talibus moribus prædita eſt, ut mereatur conſortium, mereatur et nomen uxoris. Præſta concubinæ tuæ libertatem, et nomen uxoris, ne tu adulter ſis potius quam maritus. C. 32. Q. 4. C. 9.

nude connexion may anſwer the demands of duty; but, in eſtabliſhed ſocieties, the obligations of a citizen require that it ſhould be cloathed with the forms, in which it has been inveſted by the laws. The moſt important ends of the aſſociation between the ſexes can only be obtained by its permanency and continuing for life. Marriage is a ſolemn contract to that effect, entered into in the face of the world, in the manner appointed by law. To ſtrengthen this engagement, to natural obligation laws ſuperadd their compulſion. There is a much greater ſecurity that ſuch an union ſhould be permanent, than where it depends ſolely upon the will of the parties, liable to be diſſolved at pleaſure. Concubinage differs therefore from marriage by being defective in its moſt important and eſſential quality; and the ſuperior firmneſs of the matrimonial union, beyond a mere voluntary connexion, is perhaps one of the greateſt advantages, which ariſe from the eſtabliſhment of civil ſociety.

It

It is the office of laws therefore to diſcourage every other connexion than that of marriage. With reſpect to direct puniſhments, indeed, to be inflicted upon the offending parties themſelves, except in the higher degrees of guilt, much allowance is uſually to be made for human frailty, and the impetuoſity of the paſſions, upon a ſubject which is peculiarly under their influence; but other diſcouragements might be held out, by not acknowledging, as to any legal effect, relations founded upon connexions which the laws diſapprove. The rights and privileges of huſband and wife, of parent and child, ſhould belong only to thoſe who are known to the law under thoſe deſcriptions. A father, or mother, ſhould not be allowed to acquire any civil parental authority by an improper act, nor to communicate to their offspring, by the mere effect of law only, any part of their property, or privileges. But, whilſt theſe inconveniences may properly be inflicted in order to deter men from entering into a connexion, which

By direct puniſhments.

By diſavowing the connexions as to any legal effect.

might thus affect their poſterity, yet it would be hard to carry that puniſhment farther, and to be too ſevere upon the unfortunate, but unoffending offspring, for the improper conduct of their parents. It would ſatisfy every principle of policy merely to diſavow the connexion, to deprive the parents of all civil parental authority, to prevent children from reaping any benefit from the relation, to allow them no ſhare in their parent's inheritance; in ſhort, to place them in the ſituation of mere ſtrangers. But it would go beyond the fair line of reaſon and juſtice to lay them under any poſitive diſqualifications, to prohibit parents from exerciſing, in their favour, the right of diſpoſing of their property, which they were at liberty to extend to any ſtranger to their blood, to exclude them from any of the general civil rights of other ſubjects, or to conſider them as abſolutely incapable of filling any offices in the ſtate.

Such are the few, and obvious principles, which ſuggeſt themſelves upon a theoretical view

view of the ſubject. We will now proceed to inquire in what manner they have been reduced into practice, in the laws of different nations. In this curſory examination, it will be ſeen, that, though they almoſt all agree in the neceſſity of encouraging marriage, the means adopted for that purpoſe are various; in ſome inſtances falling ſhort of, and in others, going much beyond, thoſe principles, as their peculiar notions, habits, and manners might direct, or as their particular circumſtances might ſeem to require.

II. The *Practice.*

1. The Firſt ages.

In the ſimplicity of the early ages of the world, not only concubinage, but the moſt caſual and temporary connexions were openly permitted without cenſure, as appears by the curious picture of primitive life which is diſplayed in the book of Geneſis, and particularly by the ſtories of Tamar [b], and the daughters of Lot [c], and it ſeems that little or no diſtinction was made between baſtards and legitimate children. Abraham indeed gave all his property to

[b] Gen. xxxviii. 14.—[c] xix. 8. 31.

Iſaac, and ſent away the ſons of his concubines with gifts into the eaſt [d]; but this was a deviation from the uſual practice, to preſerve the ſucceſſion of his family in the peculiar and appointed line of deſcent. In a more illuſtrious inſtance, the poſterity of Jacob's concubines partook of the patriarch's bleſſing [e], and were admitted, equally with the deſcendants of his wives, to ſhare in the diviſion of the promiſed land [f]. The ſame obſervation may be extended to the heroic times of Greece. Many of thoſe great characters, whoſe magnanimous exploits have excited the admiration, and even the idolatry, of more refined periods, were the offſpring of illicit amours. I need mention only Hercules, Theſeus, Achilles, and Pyrrhus.

3. The Jewiſh Law. Encouragement of marriage. Diſcouragement of celibacy.

The ſacred duty of marriage was no where more ſtrongly enjoined, or more ſcrupulouſly performed, than amongſt the Jews. In their opinion, every man was bound to contribute

[d] Gen. xxv. 6.—[e] xix.—[f] Joſ. xiii. See Gen. xxii. 24.—xlix.

to

to the beſt of his power, to the completion of the prophetic bleſſing which was promiſed to their forefather Abraham, that his poſterity ſhould become as innumerable as the ſtars of heaven, or the duſt of the earth. The permiſſion, or benediction, given to the firſt parents of mankind, INCREASE AND MULTIPLY, was interpreted as a poſitive and univerſal command. Every man was bound to marry before he had completed his twentieth year, and no exemption, but an abſolute incapacity, was admitted [g]; except to the ſtudents of the law, whoſe minds were ſuppoſed to be fixed upon celeſtial objects [h]. By the rabbins, the conjugal obligation was inexorably inſiſted upon; celibacy was held to be a ſpecies of negative homicide [h]; and the addition of a ſoul to Iſrael was thought equivalent to the creation of a world [i]. But the precept was inforced by

[g] Selden. De Jur. Nat. ex Diſc. Ebr. lib. 5. c. 3.

[h] Auguſtus had the ſame ſentiment in Dio. l. 56. p. 659. Ed. Steph. Μιαιφονεῖς, καὶ τυχηρεῖς ἀρχὴν τινος ἐξ ὑμῶν γιγνῆσθαι ἐφιλοτίμει.

[i] Maimonides and R. Eliezer, quoted by Selden. l. c.

no temporal ſanctions. A new bridegroom indeed was favoured by a year's exemption from the toils of war and buſineſs[k], but no penalties were inflicted upon the unmarried; they were charged with no additional burdens, they were diſqualified from no civil ſituations, and they were not even excluded from the prieſthood, which required a bodily purity and perfection that was punctiliouſly immaculate[l].

Concubinage allowed.

But they ſeem to have been more attentive to the ſubſtance, than the form, in the performance of this duty. Though, under the legiſlation of Moſes, promiſcuous fornication was forbidden[m], yet, agreeably to the manners which have always prevailed in the eaſt, the ſtate of concubinage, as well as polygamy, was admitted, and acknowledged by the laws. Solomon was not reproached for the number

[k] Deut. xxiv. 5. [l] Levit. xxi. 16. Yet Giannone ſays, (Opere Poſthume, p. 193.) Gli Ebrei ſtabilirono gravi pene e caſtighi a' celebi. I find no traces of them either in Selden, or the books of Moſes.

[m] Deut. xxiii. 17.

of

of his wives, or concubines, but for their being heathens, and his ſuffering them to inſtice him to idolatry [n]. The equal diviſion of the promiſed land would ſerve as a rule of deſcent, and the iſſue of a marriage enjoyed ſcarce any prerogatives above their natural brethren. If the mother indeed was a ſlave, or a ſtranger, the children partook of her incapacities; becauſe the pure blood of the Hebrews was not to be contaminated by ſuch intermixtures; but the iſſue, not only of concubines, but even of inceſtuous marriages, were allowed to ſhare equally with legitimate deſcendants, in the inheritance of their parents [o]. It was, however, like any other, the moſt trifling blemiſh, a diſqualification from the office of prieſt [p].

Baſtards inherited.

If we enquire how far the conſent of their parents was neceſſary to the validity of their

How far the conſent of their parents was neceſſary to marriage.

[n] 1 Kings, xi. Gen. xxv. 6. xxxv. 22. xxxvi. 12. 2 Sam. iii. 7. v. 13. xx. 3. 2 Chron. xi. 21. Judg. xix. xx. 1 Chron. i. 32, &c. &c. [o] Selden de Succeſſ. ad Leg. Ebr. c. 3. [p] Id. de Succeſſ. in Pontif. l. 2. c. 2. and ſee Deut. xxiii. 2. "A baſtard ſhall not enter into the congregation of the Lord."

marriage,

marriage, little difficulty can ariſe. No marriage could be contracted by legitimate minors, if the male was under the age of thirteen years and a day, or if the female had not completed her twelfth year with the addition of a day, without the conſent of their father or tutor; but no conſent was required after thoſe reſpective periods of full puberty [q]. The ſame rule muſt have held good with reſpect to illegitimate children, and therefore that they were perfectly at their own diſpoſal after the age of conſent.

3. The Grecian laws.

Of the Grecian laws, no complete ſyſtem is extant. But the fragments, which are to be found in the orators, hiſtorians, and comic writers of that celebrated people, have been collected with care, and are well known to all who have the ſlighteſt tincture of ancient literature.

Spartan laws.

According to the true ſpirit of the Spartan government, in their ſevere inſtitutions, whilſt women were conſidered as mere animal ma-

[q] Id. Uxor Ebr.

chines

chines for the fabrication of ſoldiers, the delicacy of the ſex, and thoſe fine feelings of nature which conſtitute ſo large a part of the happineſs of a more poliſhed people, were totally diſregarded. Their robuſt virgins performed all the manly exerciſes of wreſtling, running, and dancing, at the public feaſts and ſacrifices, in a ſtate of perfect nudity, and were not allowed to marry, till five and twenty years had given full maturity to their conſtitutions. Though we are told that virtue was obſerved in its ſtricteſt purity, and that adultery was totally unknown, yet an huſband, who had not been ſucceſsful in his matrimonial endeavours, might lawfully call in the aſſiſtance of a more vigorous neighbour, and he who was deſirous of children, without the trouble, or expence, of a regular domeſtic eſtabliſhment, might occaſionally borrow the wife of his friend[r]. Fertility was rewarded by a partial, or total exemption from the public burdens, in proportion to the number of children.

[r] Xenophon Lacedæmon. Repub. 1. Plut. in Lycurgo.

They who deferred marriage beyond the time fixed by law were ſubject to puniſhment, as well as they who made improper matches, ſuch as, by preferring a rich, before a virtùous, bride, or by chuſing an old, a dwarfiſh, a deformed, or an unhealthy ſubject, contrary to the injunctions of Lycurgus. But their puniſhment, as well as that of celibacy, perhaps was rather by diſgrace than by actual penalties[r], and it would be almoſt ridiculous to repeat the ſtories of their being compelled to run naked round the public forum, inſulted by ſongs, of their being excluded from the ſight of the naked exhibitions of the young virgins, and running the gauntlet round the altars, whilſt they were beaten by the females. In ſuch a ſtate, if illegitimate children ſubſiſted, they muſt have been adopted by the public, and, in the imperfect accounts of that community, I have been able to diſcover no traces of their peculiar ſituation.

[r] The γεφυραι αγαμιαι, ὀψιγαμιαι, and κακογαμιαι, are mentioned by Plutarch.

The

Athenian laws.

Penalties of celibacy, and rewards of marriage.

The Athenians were no leſs deſirous of encouraging marriage. From the time of Cecrops polygamy was prohibited, but, when the ſtate was remarkably exhauſted of citizens, it has been ſaid [s], that every man was enjoined to take a ſecond companion. That even the continent Socrates was obliged to comply with the law; and if his two wives alienated the affections of Euripides from the female ſex [t], as is ſuggeſted by Aulus Gellius, it is a circumſtance not much in favour of a plurality of women. The peculiar rewards of fecundity, and the penalties of celibacy, which it was the object of an appropriate action to enforce [u], are not related, but we are expreſsly told that they who had no children were excluded from the offices of orators and generals, and other public ſituations in the ſtate [w].

Concubines.

Yet concubines were permitted by law, as well in the poliſhed ages, as in the heroic

[s] Petit. Leg. Att. lib. 6. c. 1.

[t] A. Gell. l. 15. c. 20.

[u] Η αγαμιου γραφη. Plut. de Amore Prol.

[w] Dinarchus in Demoſth. Heineccius.

times

times of Greece, and they were not conſidered as diſgraceful[x]. The concubinary might legally kill a man whom he detected in an improper ſituation with his concubine, as an huſband might, under the ſame circumſtances, ſlay an adulterer. In an oration of Lyſias, he defends the murderer of Eratoſthenes, upon the ground of that law, which he expreſsly refers to[y].

Who were baſtards.

Though in the early times of the Athenian hiſtory, perſons were admitted citizens, without much difficulty, yet in ſucceeding periods, when the glory of the republic was at its height, when every man was a legiſ-

[x] Euſtath. In Hom. Il. 9. v. 340.

[y] As this paſſage is not in Petit, I ſhall quote it at length. Διαρρηδην ωμολογει, τουτον μη κολαζειν, ὃς αν επι δαμαρτι τη ἑαυτου μοιχον λαβων, ταυτην την τιμωριαν ποιησηται· (ὡτι μεν βελτιον χρησθαι) και ὁτω σφοδρα ὁ νομοθετης επι ταις γυναιξι δικαια ταυτα ἡγησατο ειναι, ὡστε και ΕΠΙ ΤΑΙΣ ΠΑΛΛΑΚΑΙΣ, ταις ἁπλουστερας ἀξιαις, ΤΗΝ ΑΥΤΗΝ ΔΙΚΗΝ ΕΠΕΘΗΚΕ. Lyſias à Taylor, p. 17. From a paſſage in Demoſthenes, this appears to have been originally one of Dracon's laws. Ο μεν νομος εστιν ὁτος Δρακοντος—Εαν τις αποκτειν—η επι δαμαρτι—η επι παλλακη—τουτων ἑνεκα μη φευγειν κελευων. Oration againſt Ariſtocrates. Ed. Wolf. p. 435. C.

lator

lator and a judge, and might become a magiſtrate[z], they were too proud and too jealous of their rights and privileges to communicate them eaſily. Pericles introduced a law that no man ſhould be intitled to the rights of citizenſhip whoſe parents were not both Athenians[a]. It is not quite certain whether this was a new regulation or the revival of a law of Solon. It was brought in by that eminent ſtateſman, perhaps, from party views[b]: but this revival was a meaſure which proved highly deſtructive to his country. Upon the occaſion of a large preſent of corn from the King of Egypt, which was to be diſtributed amongſt thoſe only who were citizens, this fatal law was ſeverely enforced, no leſs than five thouſand peaceable inhabitants were baſtardized, eraſed from the regiſters of the city, and ſold for

[z] The capability of being choſen even archon was extended to all ranks of citizens after their return from the Perſian war. Plut. in Ariſt.

[a] Μόνοις Ἀθηναίοις εἶναι τοῖς ἐκ δυοῖν Ἀθηναίοιν γεγονόσιν. Plut. in Vita.

[b] To exclude the children of his rival Cimon.

ſlaves,

ſlaves, and the ſtate was irrecoverably weakened by ſuch a reduction of the number of citizens [c]. In ſucceeding times it again grew obſolete, and was again renewed after the expulſion of the thirty tyrants, when Euclides was archon.

Their incapacities.

All thoſe who were not born, according to the eſtabliſhed rites of marriage, and, whilſt theſe laws were in force, of two Athenian citizens, were nothi or baſtards; and, if the man only was a citizen, the children were ſojourners, or ſlaves, according to the condition of the mother. As early as the time of Solon, no male or female baſtard could ſucceed to their parents or anceſtors

Could not inherit.

[c] Plut. in Pericle. Xylander thinks that the paſſage which ſays that they were ſold is corrupted. But it was the law, firſt, that a ſcrutiny ſhould be made by the citizens of each borough, and if a man was found not to have had both father and mother citizens, he was merely eraſed from the regiſter, and allowed to remain as a ſojourner. But, ſecondly, if he appealed to the judges, and the former ſentence was confirmed, he was ſold as a ſlave. Argument to Demoſth. againſt Euboulides—καὶ μὴν ἄλλως καὶ πάρεστι τῷ δικαστηρίῳ ΠΕΠΡΑΣΘΑΙ. So Suidas.

by

by the rights of conſanguinity in matters either ſacred or civil [d]. They could inherit no property, and being excluded from the religious rites of their family, they had others appropriated to themſelves, at a place called Cynoſarges.

The natural duty of filial affection was enforced by law. They who neglected to maintain their parents were puniſhed by infamy [e], which comprehended an excluſion from the public aſſembly, the temples, and other civil rights; and if they preſumed afterwards to appear in the prohibited places, a pecuniary, or corporal puniſhment, was inflicted. But if parents had been deficient in their duty, if they had taught their children no uſeful art, if they had proſtituted their perſons, or if by an improper connexion they had ſtamped them with the diſgraceful and indelible appellation of baſtard, they were held to have forfeited their

Not bound to maintain their parents.

[d] Μητε νοθῳμηδε νοθῃ αγχιστειων ειναι μητ' ἱερων μητ' ὁσιων. Iſæus Eſtate of Philoctemon. Ariſt. Aves. 1659.

[e] Ο τους γονεας — μη τρεφων — ατιμος εστω.

title to be honoured and ſupported by the children whom they thus irrevocably injured [f].

Parents could not bequeath beyond a certain ſum.

As they could ſucceed to no part of their father's property, in any caſe, if he died inteſtate [g], neither was he at liberty to bequeath them beyond a certain ſum. His liberality was limited to five, or more probably, ten minas, equivalent to about thirty-five pounds of modern money [h]. To prevent impoſition, they were obliged to prove themſelves really the teſtator's children in a peculiar court.

[f] Μηδε τοις εξ εταιρας γινομενοις εισαγειν εις τους φρατερας τιθεναι. Plut. in Solone.

[g] In Ariſtophanes. Aves. Piſthetærus tells Hercules that Neptune would ſucceed to Jove's property, becauſe Hercules was a baſtard. Ουτος ὁ Ποσειδων, &c.

[h] Τοις νοθοις μεχρι πεντε μνων (or χιλιων δραχμων) καταλειπειν. Scoliaſt. on Ariſtoph. Suidas. Meurſius, p. 588. That they might leave ten minas ſeems to be confirmed by Iſæus. Eſt. of Pyrrhus. Phila, the baſtard of Pyrrhus, receives that ſum as a portion from his nephew and adopted ſon. This proviſion was called τα νοθεια, and ſuppoſing a mina equal to one hundred drachmas, or about 3l. 10s. 10d.—five will be 17l. 14s. 2d. ten 35l. 8s. 4d.

The

The Athenians permitted fathers to abdicate their legitimate children, a right which was pointedly rejected from the Roman code[1]. And they admitted the power of adoption in its fulleſt extent, when there was no legitimate offspring.

Whether baſtards could be adopted?

If baſtards could have obtained a perfect admiſſion into their father's family by that ceremony, it would have been in his power to have rendered them in fact legitimate, and to have counteracted the proviſions of the laws at pleaſure. But, with reſpect to the qualifications of the perſons who might be adopted, I feel a conſiderable difficulty, ariſing from two contradictory paſſages in the orations of Iſæus. By one paſſage, it is clear that foreigners might be adopted, and by that means acquire the freedom of the city; for he ſays, that there are only two motives to adoption, either that they are made "by men who have no children, or "who are compelled by their poverty to

[1] L. 6. C. De Patria Poteſtate.

" adopt ſome wealthy foreigners, from " whom they expect a pecuniary acknow- " ledgment, for the benefit conferred on them " by making them citizens of Athens[k]." Yet in his ſpeech concerning the eſtate of Apollodorus, where he minutely deſcribes the ceremony of adoption, he expreſsly ſays that it was the law, that when a father brought his adopted ſon to the altar to be inrolled in the regiſter of his diſtrict, he was bound to take a ſolemn oath, " that " the perſon whom he ſo introduced was " the child of a female citizen of Athens, " and born in lawful wedlock[l]." Under this embarraſſment, I find no relief either in the ponderous learning of Reiſke, or in the elegant commentary of Sir William Jones, and I leave it to thoſe who have more leiſure to extend their reſearches, to reconcile theſe ſeeming inconſiſtencies; more eſpecially as the queſtion does not ſo directly relate to my preſent ſubject. For whatever might be the caſe

[k] Fragment of an oration for Euphiletus.

[l] Εαν τινα εισαγαγη τις Ποιητον επιτιθεναι φρατηρ κατα των ιερων, η μην ΕΞ ΑΣΤΗΣ ΕΙΣΑΓΕΙΝ ΚΑΙ ΓΕΓΟΝΟΤΑ ΟΡΘΩΣ.

Demoſthenes

caſe with other perſons, who were not citizens, I think it is pretty clear, from an inſtance which occurs in hiſtory, that baſtards could not be adopted, and probably their incapability was created by the law which I have laſt quoted.

Caſe of Pericles.

It is related by Plutarch, that when Pericles had loſt his legitimate ſons by the plague, the Athenians, who were courting him to reaſſume the government of which they had capriciouſly deprived him, to ſooth the afflictions of his mind, and to compenſate their former ingratitude, repealed the law of Solon above mentioned, which Pericles himſelf had renewed, and ſo ſeverely inforced, and allowed him to inroll his ſon by the celebrated Aſpaſia, who was a Mileſian, as his legitimate child. I apprehend

Demoſthenes likewiſe mentions this oath in his Oration againſt Neæra. After Phraſtor had failed in his fraudulent attempt to impoſe his illegitimate ſon for a legitimate child, and to procure his being regiſtered as ſuch, he reſolved to adopt him, και ιστι ομνυν εις τας γενεας, αποφηφισα μενον τον γνησιον, και διδοντων ημιν αυτον εις θυγατερα ποιεισθαι (ουκουν αυθις επιδικαζειν ημιν;) Ed. Wolf. p. 526.

that this was a private law, and did not extend beyond that particular caſe; it is ſpoken of as an uncommon act of kindneſs on the part of the people; and Suidas adds, that great perſuaſion and bribery were employed upon the occaſion, and that it was at laſt obtained with the greateſt difficulty [n]. Now if he could have adopted his natural ſon in the ordinary form, there could have been no occaſion for an expreſs law for the purpoſe.

Could ſeldom take place.

It was poſſible indeed that a previous admiſſion to the freedom of the city might render a baſtard capable of being adopted; but the laws had impoſed ſo many reſtrictions upon the exerciſe of this power, that it could ſeldom take place, and only in caſes of very extraordinary merit. No man, by an expreſs law, could receive his freedom who had not deſerved great marks of favour by ſervices performed to the ſtate. It was

[n] Voce Δημαποιητος. Απ᾽ ολιγων και δικαιαιλος της αυτονομου ζωντας, ουδε και μολις, τον νοθον οι παιδα, εξ Ασπασιας της Μιλησιας ποιησι δημοποιητον. Petit.

beſtowed

beſtowed by a ſolemn decree in the aſſembly of the people; and even then it was not valid, unleſs it was confirmed in a ſubſequent aſſembly compoſed of at leaſt ſix thouſand members. The votes were to be given ſecretly, and other forms were obſerved to prevent improper influence, and that ſo high an honour might not be conferred without great deliberation. Nor was even this ſufficient, for the queſtion of merit was ſtill open to inveſtigation; any man might inſtitute a ſuit againſt the new citizen, and if it was decided that he had not deſerved ſuch a favour, the grant was pronounced void, as being contrary to law *.

4. Roman Laws. 1. The encouragement of marriage, and penalties of celibacy. From the foundation of Rome.

The attention of a ſtate, which was martial from its origin, and whoſe principal object was conqueſt, would neceſſarily be directed to the ſureſt and moſt effectual means of procuring an extenſive population. Accordingly, laws for the encouragement and regulation of marriage are to be traced from

* Demoſth. againſt Neæra, p. 530. A.

the foundation of Rome [p], during the regal government, and in the earlieſt periods of the republic. Of the lawleſs vagabonds, who compoſed the firſt inhabitants of that city, one hundred only could boaſt of a legitimate birth, and they were honourably diſtinguiſhed by the title and prerogatives of patricians [q]. The deſpotic ſovereignty of every father of a family, and the power, without controul or reſponſibility, which he exerciſed over the lives, the property, and the liberty, of his wife, his children, and his domeſtics, eſtabliſhed by Romulus, may be conſidered as an inducement, held out by a politic legiſlator, to diſpoſe a wild and barbarous people to ſubmit to the reſtraints of domeſtic ſociety. In the reign of Numa, the ſame motives occaſioned the firſt relaxation of this ſevere authority; a ſon who

[p] Dion. Caſſius. lib. 56. p. 660. Απ' αρχης ευθυς αμα τη πρωτη της πολιτειας παλαισασιν ακριβως περι αυτων νομοθετηθη. και μαλιστα μεν πολλα και τη βιαιη, και τω δημω εδοξεν, i. e. περι παιδοποιιας και γαμων.

[q] Quod patres ciere poſſent. Liv. lib. x. c. 8. Dionyſius Halicarnaſſenſis relates but diſapproves of this account of their origin. A. R. lib. ii. p. 81. Ed. Hudſon.

married

married with his father's approbation could be no longer ſold as a ſlave[r]. By another law of the ſame king, which has been preſerved, and affords a curious ſpecimen of the ancient Latin language, a concubine was forbidden to marry, unleſs in an habit of repentance with her hair diſhevelled ſhe offered a propitiatory ſacrifice of a female lamb to Juno, the goddeſs of chaſte and wedded love[s]. After the abrogation of the monarchy the ſame objects were attended to by the ſenate and people. Early proofs are to be found of the privileges granted to thoſe who had children[t]. It was a part of the

[r] Plut. Numa, p. 155, Ed. Bry.

[s] Pellex aſam Junonis ne tagito, ſei tagit, Junonei crenebus dimiſſeis acnom feminam cædito. Feſtus, voce Pellex. In after times, this word acquired a peculiar ſignification. It was then equivalent to Amica. L. 144. ff. De Verb. Sig.

[t] Liv. l. 2. c. 9.

The law, made in honor of the curiatii, and which ſubſiſted in the time of Dionyſius Halicarnaſſenſis, that they who had three children at a birth ſhould be maintained at the expence of the public, may be referred likewiſe to this head, Ed. Hudſ. p. 154.

cenſorial

cenſorial office to prevent celibacy, by a diſtribution of rewards and puniſhments, and the fine which was impoſed, under the name of Aes Uxorium, ſerved at once to enforce the laws and to enrich the treaſury [u]. When Quintus Metellus filled that high ſtation [w], he propoſed a law that every man ſhould be compelled to marry. The event of this attempt has not been handed down to us, but a part of the oration which he delivered upon the occaſion is ſtill extant amongſt the valuable fragments of antiquity, and was repeated by Auguſtus upon a ſimilar occaſion [x].

The Romans averſe from marriage.

The reaſon.

Notwithſtanding theſe regulations, an averſion from marriage was an inherent and unconquerable defect in the manners and ideas of the Romans. It is aſcribed to the general profligacy of the men, the pride, extravagance, and wantonneſs of the ma-

[u] Cælibes eſſe prohibento. Cic. de Leg. A. Gel. lib. 4. c. 20. Plut. Camill. p. 286. [w] A. U. C. 622.

[x] Epit. Liv. l. 59. A. Gell. lib. 1. c. 6.

trons,

trons, and the uncommon attentions and honours which were paid to thoſe who were rich and childleſs. Theſe might be the immediate cauſes, and they exiſted as early as the ſecond Punic war [y]; but we may perceive that the real foundation was laid much deeper, in the laws themſelves. The matrimonial yoke, in the ſolemn marriages which were firſt in uſe, was too ſtreight and galling; in the leſs ceremonious kind, which gradually ſuperceded them, it was too lax. Originally, the huſband purchaſed his wife of her father for a valuable conſideration, and ſhe was transferred, in full right of property [z], like any other domeſtic animal. Such a ſtate of ſlavery was incompatible with the notions of a poliſhed people, and the matrimonial connexion of an eaſier nature was introduced. It was an equal contract, between two independent perſons, and

[y] In Plautus, Mil. Glorios. Act. 3. Sc. 1. Periplectomenes, a benevolent, but ſomewhat loquacious, old man, gives a lively deſcription of the Roman wives, and the intereſted kindneſs of his relations.

[z] Res mancipi.

bore

bore much reſemblance to an ordinary partnerſhip. Either party might diſſolve it at pleaſure, and whilſt it continued the union was very imperfect. Each had their diſtinct property; the huſband acquired nothing but what was expreſsly defined by agreement; even of the marriage portion he was allowed only the uſufruct, and in caſe of death, or ſeparation, was rigidly accountable for the ſubſtance. All the laws looked rather to the poſſibility of a diſſolution, than of the continuance of the connexion; and, in that view, married perſons, to prevent the advantages which might be taken of an unguarded affection in the fond hours of conjugal dalliance, were even incapable of making valid donations to each other, which might prove injurious to themſelves or families.

Such looſe bands were not likely to contribute to the happineſs of the married ſtate. A lady, who had brought with her, and retained, a large fortune, which ſhe could transfer to any other object her inclinations

might lead her to prefer, was not likely to make a very dutiful or obedient wife. A huſband who had married a rich woman, who might divorce him when ſhe pleaſed, muſt have been in a ſtate of ſubmiſſion and ſlavery not much to be envied. The ſatyriſts, comic writers, and epigrammatiſts, have raiſed both our indignation and our mirth, at the many horrid and ludicrous ſcenes which ſuch abſurd ſituations muſt neceſſarily have given riſe to. It is from this independence of the Roman wives, that we may eaſily deduce that impropriety of conduct, which was the great obſtacle to marriage.

Regulations by Julius Cæſar.

Two thirds of the citizens of Rome had periſhed in the conteſts for power which enſanguined the latter days of the republic [a]. This exhauſted condition of the ſtate, which appeared upon the cenſus made by Julius Cæſar, ſuggeſted to that great man the neceſſity of employing new expedients to en-

[a] In the year of Rome 682, the number of citizens was 450,000. (Epit. Liv. lib. 98.); in 708, they were reduced to 150,000. (Id. lib. 115.)

courage

courage marriage and population [b]. The particulars of his regulations are not extant, except that he divided the Campanian territory amongſt twenty thouſand citizens, who had three children or more [c]; and prohibited women, who were unmarried or childleſs, and under forty-five years of age, from the uſe of litters, purple garments, and pearls [d].

By Auguſtus. Lex Julia, and Papia Poppæa. The hiſtory of thoſe laws.

His ſucceſſor Auguſtus purſued with vigour and perſeverance the ſame principles of policy. The hiſtory of his celebrated laws upon this ſubject, the Lex Julia and the Lex Papia Poppæa, affords ſome curious circumſtances, highly illuſtrative of the ſpirit and the manners of the times. The artful conduct of that able prince to conceal his power, by preſerving the ancient forms of the republic, is well known. Thoſe forms required that every law ſhould be ap-

[b] Dio. lib. 43. p. 256. Επειδη δυση ολιγανθρωπια, δια το των απολωλοτων πληθος, &c. πολυπαιδιας αθλα επιθηκεν.

[c] Suet. c. 20. [d] Id. c. 43. and Euſebius there quoted in the note of the learned editors.

proved

proved by the ſenate, before it was propoſed in the aſſembly of the people. When the queſtion was brought forwards, it met with violent oppoſition from the ſenators, they complained much of the profligacy of both ſexes, which was the great impediment to matrimony, and hinted in pretty broad terms at Auguſtus himſelf, who was certainly not the pureſt example of conjugal chaſtity. The emperor replied, "that nothing more was in his power than to "provide ſuch laws as were moſt beneficial "to the ſtate; but that the correction and "amendment of the private morals of "wives depended more upon the conduct "of huſbands themſelves, whoſe duty it "was to reſtrain their improper behaviour "by ſalutary precepts and admonitions, as "he had never failed to do in his own fa-"mily." His opponents were curious to know what were the leſſons which he had inſtilled unto his Livia.—"They related to "her dreſs, her frequenting public places "and the general modeſty of her beha-

"viour;"

"viour;" and they who were unacquainted with the character of the empreſs and the private life of their ſovereign might have given credit to his aſſertions. With great difficulty, however, he procured a decree of the ſenate[e]; but when it was ſubmitted to the aſſembly of the people it was rejected with great vehemence. It was propoſed again however twenty years afterwards, and with ſome mitigation of the penalties, and a clauſe that it ſhould not take effect till after three, which was afterwards extended to five, years, and after great oppoſition, it received the full ſanction of a law, under the title of Lex Julia de maritandis ordinibus. This law was always odious, particularly to the equeſtrian order, and great tumults were excited at the public games exhibited after the Pannonian and Dalmatic victories to procure a repeal. At the expiration of the five years a new law was paſſed, comprehending, with ſome alterations, all the former

[e] To this Horace alludes,—Diva, producas ſobolem, &c. A. U. C. 736.

regulations,

regulations, and providing more particularly for the improvement of the revenues [f].

This law, the Lex Papia Poppæa, derives its name from the conſuls of the year [g]. It is no longer extant in the maſs, but the law itſelf, or the many commentaries of the ancient lawyers of authority who wrote upon it, are quoted in one hundred and ninety-nine places in the Code and Digeſt. From theſe fragments, and the numerous references and alluſions which are made to it, in the hiſtorians and other writers, the ſubſtance at leaſt of perhaps the whole has been reſtored, with tolerable correctneſs, by the ſucceſſive induſtry, learning, and ingenuity of James Gothofred [h] and Heineccius [i]. Lex Papia Poppæa.

[f] The hiſtory of theſe laws is fully related in Dion. Caſſius. Lib. 54 and 56. together with Gellius. Lib. 1. c. 6. Liv. Epit. Lib. 59. Suet. Aug. c. 89. Rejection by the people. Suet. Aug. C. 34, 35.

[g] Marcus Papius Mutilus and Quintus Poppæus Secundus.

[h] Fontes Quatuor Juris Civilis. This was a juvenile and imperfect performance of that celebrated lawyer.

[i] Ad Legem Juliam et Papiam Poppæam Commentarius.

Its contents. Penalties upon Celibacy.

This law [k], whoſe profeſſed object it was to encourage marriage, to puniſh celibacy, and to enrich the treaſury, conſiſted of two correſponding parts, and extended to many different ſubjects, ſome of which had little relation to the only point of view under which it is now conſidered. All perſons, who were capable of performing the conjugal duties, were bound to marry, and they who neglected to comply with this injunction, whether males or females, whether in a ſtate of virginity, widowhood, or divorce, were declared incapable of taking any property by will, except what was bequeathed to them by a relation within the ſixth degree. Their right of inheritance, in the caſe of inteſtacy, was not affected, and, after a legacy became due, they were allowed an hundred days for deliberation, within which time they might remove the diſqualification, or otherwiſe what was ſo left, in defiance of the laws, was confiſcated to the ſervice of the ſtate.

[k] Tacit. Ann. L. 3. 27.

Eunuchs,

Eunuchs, infants under the age of puberty, men beyond ſixty, and women who exceeded fifty years[l], were the only perſons exempted from this penalty. After the death or divorce of his wife, the man was allowed no interval of privilege[m], but a woman could not exceed two years from her widowhood, or one year and an half from a divorce, without being again liable to the incapacities of a ſingle ſtate. Eſpouſals in almoſt every part of the Roman Law were conſidered as equivalent to marriage. Who were liable to them.

A condition of celibacy or widowhood annexed to a bequeſt was void; as was an oath entered into by a ſlave to that effect, as the terms upon which he was manumitted[n]. Other regulations.

[l] Though men did not marry before ſixty, or women before fifty, after that age they were free from the penalties of celibacy by the Papian Poppæan law. But by the Pernician Senatus conſultum, in the reign of Tiberius, they were ſtill liable to them. By that of Claudius, a man of ſixty might avoid them by marrying a woman under fifty; though, on the other hand, a woman above fifty was not diſcharged by marrying a younger man. Ulpian. tit. 16.

[m] See note [t] poſt. [n] L. 6. ff. § 4. De Jure Patron.

If parents, without reaſon, prohibited their children from marrying, their conſent might be ſupplied by the magiſtrate°; and, to prevent evaſion, no man could entitle himſelf to the benefit of the law, by eſpouſing a girl under puberty, or by any eſpouſals which were not carried into effect within two years.

Penalties removed in part by marriage.

Where there was ſuch an univerſal corruption of manners, the purpoſe of theſe regulations would have been defeated by nominal marriages, by the horrid arts of abortion, and the deſtruction of children. Theſe penalties therefore were only removed in part by entering into matrimony, and married perſons between the reſpective ages of twenty and fifty, if females, or between twenty-five and ſixty, if males, who had no iſſue, were intitled only to one half of the bequeſt of ſtrangers. They could likewiſe only leave to each other one tenth, and the uſufruct of one third, part

° By a ſubſequent conſtitution of Severus and Antoninus, the magiſtrate might aſſign them a reaſonable portion, if their parents refuſed. L. 19. ff. De Rit. Nupt.

of

of their property, unleſs they were related within the ſixth degree, or the huſband was abſent in the ſervice of his country, and for one year after [p].

Gradually and totally removed by children.

If their efforts proved fortunate in the production of citizens, theſe incapacities were gradually removed.

As to bequeſts between huſband and wife; for every child of a former marriage that was living, they could add another tenth; of the children by the ſubſiſting marriage, one, or two, who ſurvived to the ninth day from their birth, but not otherwiſe, enabled them to bequeath ſo many more tenths. And one common child, who was in being at the death of the party, three which had died at nine days old, two, after the age of three years, or one which had ſurvived the period of puberty, gave them a power of making mutual bequeſts to any amount [q]. And

[p] Vide note I. poſt.

[q] Ulpian. tit. 16, 17. Theſe laws, relating to the capacity of taking by will between huſband and wife, were called Leges Deſimariæ.

every diſqualification was totally taken away, with reſpect to the father of a ſingle living child, to a free-born female citizen who had three, and a libertine, that is, a freed woman, or manumitted ſlave, who was the mother of four children; who were diſcharged likewiſe from the reſtraint of their perpetual tutor, whilſt that office ſubſiſted.

Rewards for children.

Beſides the exemption from the penalties of celibacy, other privileges and honours awaited the father of a family. A man who had three children born at Rome, four in Italy, or five in the provinces, was excuſed from all thoſe burdenſome and unprofitable offices in the ſtate, which were merely perſonal, that is, ſuch as were executed, without expence, by the exertions only of the mind or body, though not from ſuch as were patrimonial or mixed[r]. In the competition for public honours, he who was bleſſed with the moſt numerous progeny was preferred to his rival candidates, and every child deducted a year from the legal age of qualifi-

[r] For the diſtinction ſee L. 18. ff. De Muner.

cation

cation of his parent. The ſame circumſtance determined the precedence between the conſuls in bearing the faſces, and in the choice of provinces [s], and in the colleges of decurions gave the priority in voting [t].

To libertines, female patrons, ſlaves, and thoſe who had the jus latinum.

The condition of libertines or freed men was improved likewiſe by their fertility. By a certain number of children they were diſ-

[s] Tacit. An. Lib. 15. c. 19. But it does not appear whether this privilege was given by the Papian Poppæan law.

[t] L. 6. § 5. ff. De Decur. In the abſtract of this law which Monteſquieu has given, Liv. 23. ch. 21. three errors may be obſerved. 1. He ſays, that huſbands, as well as wives, were allowed an interval of time, after their marriage was diſſolved, by death, or divorce. But all that is known of this clauſe, is contained in a fragment of Ulpian, title 14. who mentions only the wife, Feminis lex, &c. tribuit vacationem. 2dly, He has been miſled by Gothofred to ſtate, that if an huſband abſented himſelf from his wife for any other cauſe than the buſineſs of the republic, he could not be her heir. Ulpian (tit. 16.) ſays no ſuch thing; and the error has long ſince been confuted by Schulting, Juris. Ante-Jus. Heineccius, &c. &c. 3dly, "The ſenator who had moſt children was enrolled firſt in the catalogue, and voted firſt." The law, to which he refers, does not ſpeak of the ſenate, but of the colleges of decurions. L. 6. § 5. ff. De Decur.

charged from their ſervices to their patron; a female libertine who married with his conſent was entitled to the ſame privilege; the ſucceſſion to their property was reduced to a certain proportion only, or entirely aboliſhed, in proportion to the circumſtances. The rights of female patrons, which in general were inferior to thoſe of male patrons, were enlarged, and even a cuſtom prevailed that a female ſlave, by three parturitions, acquired an exemption from the ſeverities of labour, and, by more, her liberty. A child who lived to be a year old, beſtowed on his father, who had the imperfect rights of latinity, the full privileges of a Roman citizen [u].

Other ſubſequent privileges.

Of the Tertullian decree of the ſenate, paſſed in the reign of Hadrian, by which a free-born mother of three, and a libertine who had four children, ſucceeded to the inheritance of their children, there will be occaſion to

[u] For the authorities upon which this account of the contents of the Papian-Poppæan law are founded, and the order in which the different clauſes were there arranged, I muſt refer to the learned and ſatisfactory commentary of Heineccius.

ſpeak hereafter. Some other privileges, in ſubſequent times, may be gleaned from the books of the civil law; but they are either comprehended under theſe more general regulations, related only to ſome particular offices or claſſes of men, or were of the nature of voluntary benefactions or private grants and not binding in other caſes [w].

The Jus Liberorum.

But the laws had reſerved to themſelves a power of ſupplying the defects of nature; the privileges reſulting from children might be granted to thoſe whoſe endeavours to contribute their proportion to the number of citizens had not been crowned with ſucceſs.

[w] Such as L. 1. C. Qui num. lib. ſe excus. L. 2. § 2. ff. De Excuſat. L. 1. C. De Legation. L. 132. C. Theod. De Decur. L. ult. C. De Decur. Suet. Auguſt. c. 46.—Id. Claud. c. 21. L. 8. ff. de Vacat. Muner. L. 103. C. Th. De Decur. L. 1. C. De Sumpt. Recup. L. 3. 4. De Vacat. L. 5. C. De his qui num. lib. L. 55. C. Th. De Decur. L. 24. C. eod. L. 5. § 2. ff. De Jur. immun. L. 3. § quamvis. L. 6. § quæmunera ff. De muner.

The

By whom granted.

The right of conferring this privilege was firſt veſted in the ſenate, and afterwards uſurped by the prince. The ſenate had always exerciſed a power of diſpenſing with the laws in particular caſes; and though, in the earlieſt times of the republic, it was neceſſary that the decree ſhould be confirmed in the aſſembly of the people, this ratification ſoon grew out of uſe. A law was propoſed by Caius Cornelius, the tribune (A. U. C. 686.) to reſtore this right to the people. It was however rejected; and the power continued therefore to be exerciſed by the ſenate, in the inſtances of Brutus, Pompey, and Julius Cæſar, and ſubſiſted in the reign of Auguſtus; but it was too important a part of the ſovereignty to be adminiſtered by ſubjects, and was completely annexed to the imperial authority before the time of Domitian [x].

What it was.

Married perſons, who had obtained the Jus Liberorum might make each other their

[x] Martial. 11. 91.

heirs,

heirs, to the full extent of their property; they might take likewiſe under the teſtaments of ſtrangers, and the wife could tranſact her legal buſineſs without the intervention of her tutor. It had however been the cuſtom to grant this privilege only where the ages of the parties amounted together to one hundred years, but by a conſtitution of Arcadius and Honorius, perſons of all ages were capable of it [y]. It was allowed without an expreſs grant, to builders of merchant ſhips, by Claudius [z], to ſoldiers [a], ſailors [b], and decurions, by Conſtantine and Theodoſius the Great.

Extended.

Perſons privileged.

The ſimplicity of chriſtianity had been conſiderably corrupted, when it became the predominant religion of the empire, and in nothing more than in the monaſtic inſtitutions. The penalties which attached upon celibacy were totally adverſe to the ſuperſtitious veneration at that time entertained for

Changes made in this law.

Penalties of celibacy abolished by Conſtantine.

[y] L. 1. C. Theod. De Jure Lib. [z] Suet. Claud. c. 20.
[a] L. 13. L. 16. ff. De Caſtrenſ. Pecul.
[b] L. 7. C. Th. De Navicularüis.

the

the ſuppoſed merits, and ſanctity of a virgin ſtate, and they were therefore aboliſhed by Conſtantine, together with the incapacities as to taking by the wills of ſtrangers, which affected thoſe married perſons who had no children [c d].

Jus liberorum granted to all, by Theodoſius.

But he did not remove their incapacities as to the power of bequeathing to each other, nor aboliſh the rewards of marriage [e]. Theſe remaining reſtrictions were finally ſwept away by Theodoſius the younger, who expreſsly repealed thoſe heads of the Papian-Poppæan law, which related to this ſubject [f].

[c] L. 1. C. Theod. De Inf. Pæn. Cælib.

[d] Juſtinian even gave encouragement to widows and widowers not to marry again. Nov. 127. c. 3.

[e] Verum hujus beneficii maritis et uxoribus inter ſe uſurpatio non patebit, quorum fallaces plerumque blanditiæ vix etiam oppoſito juris rigore cohibentur. C. Theod. De inf. pæn. cæl.

[f] L. 2. 3. C. Th. De Jur. Lib. L. un. de his qui num. lib. excuſ. L. 1. C. De Jur. Lib. L. 2. C. de Inf. pæn. cæl. et orb. et dec. ſubl. Decernimus inter virum et uxorem rationem ceſſare ex lege Papiâ decimarum.

All

All penalties upon celibacy, and all diſtinction between ſingle and married perſons, and whether they had iſſue or not, were therefore entirely removed before the time of Juſtinian, as to the capacity of taking by will. But other differences, and the privileges which were enjoyed by thoſe who had the number of children required by law, ſtill continued; and thoſe privileges might ſtill be communicated by a grant of the jus liberorum [g].

The next head of inquiry, into the means employed amongſt the Romans to promote marriage, by diſcouraging every other con-

2. Laws to diſcourage other connexions.

[g] This is clear from L. 2. C. De Jur. Lib. A. D. 528. A mother could not ſucceed under the ſenatus conſultum Tertullianum, unleſs ſhe had three (or four) children. That reſtriction, therefore, was not removed by the law of Theodoſius, ſince this conſtitution was iſſued by Juſtinian for that purpoſe. And mention is made of the jus liberorum in other places as ſtill ſubſiſting. The term jus liberorum was uſed in the civil law to denote the privileges of thoſe perſons who really had children, as well as of thoſe who obtained them by grant; I have employed it in the latter ſenſe only.

nexion

nexion between the ſexes, will lead us to conſider the laws relating to concubines, and illegitimate children.

Who were baſtards.

1. The children of marriages prohibited by law.

What marriages were prohibited.

All children who were not born in lawful matrimony were baſtards. But the pale of legitimate wedlock was confined to narrow bounds. Originally it extended only to the union of two Roman citizens, of the reſpective ages of puberty, not within the prohibited degrees of conſanguinity, or affinity, who were joined, by the requiſite ceremonies, with their own conſent, and that of their parents, tutors, or relations, according to the circumſtances of the caſe.

The law of the twelve tables, that patricians and plebeians ſhould not intermarry was ſoon repealed, but many other reſtrictions were introduced from time to time. The Papian-Poppæan law permitted the marriage of free-born citizens with freed women[a], which was before prohibited by law,

[a] L. 23. ff. De Ritu Nuptiarum. Againſt a mode of referring to the civil law lately introduced, by the number only

law, or cuſtom; whilſt, on the other hand, the dignity of the ſenatorial order was conſulted by forbidding perſons of that rank, and their children, to marry freed women or actreſſes [b]. The ſame law excluded from the nuptial bed of all free-born citizens, proſtitutes, procureſſes, and ſlaves who had been manumitted by perſons of that deſcription; women who had been convicted upon a popular accuſation, who had exhibited

only of the book, title, and law, I muſt enter my proteſt in favour of the old way of quoting the beginning of the law, or of the title itſelf. For, 1. Perpetual blunders are committed by printers, tranſcribers, and even authors themſelves, in references of mere figures; words can never be miſtaken. 2. Figures alone are not eaſily remembered, but the firſt words of the titles or laws, which, from the ſhort and pithy language in which they are expreſſed, uſually contain much of their ſubject matter, neceſſarily impreſs themſelves upon the mind. 3. They who have much acquaintance with the civil law ſoon learn to refer to the principal titles, from knowing the arrangement and method of the Digeſt and Code; and ſtrangers to the country will be amply rewarded for the additional trouble of turning to the table, by the certainty that they are not hunting upon a wrong ſcent.

[b] L. 44. ff. De Rit. Nupt.

them-

themſelves upon the ſtage, or had been detected in adultery [c]. In the reign of Tiberius, men above ſixty, and women beyond fifty years of age, were forbidden to marry; though Claudius permitted men of that age to unite themſelves with younger women, becauſe there was a poſſibility of iſſue [d]. Other prohibitions ſucceeded in after times; that of the marriage of the preſident, or other perſons in authority under his government, with any woman of the province that was entruſted to his care [e]; of a tutor and curator, or their ſon, with his ward, till he had paſſed his accounts, and ſhe was twenty-five years of age [f]; of a raviſher with the unfortunate object of his violence [g]; of an adulterer with the woman whom he had cohabited with [h]; and laſtly, from a ſimilitude to the natural relation, of a godfather with his godchild [i].

[c] L. 43. eod. Ulp. tit. 13. [d] Ulp. tit. 16.
[e] L. 38. ff. eod. L. 57. L. 63.
[f] L. 59. 64. 66. ff. eod. Code, title De interdicto matrim. pup. et tut. [g] L. un. C. De Rapt. Virg.
[h] L. 13. ff. De His quæ ut indig. Nov. 134. c. 12.
[i] L. 26. C. De Nupt.

But

But marriages contracted contrary to these provisions were not at first absolutely void, and they had even many of the effects of a legal connexion. Donations and bequests between the parties were not valid [k]; and if the wife proved unfaithful, the husband was intitled to his action for adultery [l]. Though they acquired none of the other rights of husband and wife [m], and were liable to all the penalties and incapacities of celibacy, the children were illegimate [n], and the marriage portion of the wife was confiscated to the treasury at her death [o]. By a decree of Antoninus and Commodus the prohibited marriages of the senatorial order were expressly annulled [p]; and it has usually been understood that the same change was

Not void till Antoninus.

[k] L. 3. § 1. De Donat. int. Vir. et Ux. Ulp. Frag. tit. 16. § 2.

[l] L. 13. Ad. leg. Jul. de Adul.

[m] Inst. tit. 10. § 12.

[n] Jul. Paul. Recept. Sent. lib. 4. tit. 8. § 4.

[o] L. 61, ff. De Ritu Nupt.

[p] L. 16. ff. de Sponsal, l. 16. pr. ff. De Rit. Nup. l. 42. eod.

effected in the law relating to all the other prohibited marriages.

Changes in the laws of marriage.

Many alterations took place in ſubſequent periods. The capability of contracting lawful marriage was communicated, with the other privileges of citizenſhip, to all the inhabitants of the Roman world, by the conſtitution of Caracalla [q]. Though Barbarians were afterwards excepted [r]. But ſo indiſpenſable was that quality, that if a man and his wife were made priſoners by the enemy, a child born during their captivity, if they all three returned to their own country, was legitimate by a poſtliminium; but if the mother and child only returned, the child was a baſtard; becauſe the father had loſt his rights as a Roman citizen by captivity, and had not recovered them by a poſtliminium [s].

The ſalutary reſtrictions to prevent improper marriages gradually became obſolete

[q] L. 17. ff. De Statu.

[r] L. un. C. Th. de Nupt Gen.

[s] L. 25. De Capt. et Poſt.

as

as the diſtinctions of the different orders began to be diſregarded, and the meaneſt of men were admitted into the ſenate, and to every honour in the ſtate. Thoſe which related to perſons of rank were again revived, extended, and inforced under ſeverer penalties by Conſtantine[t]. The decrepid Juſtin was inſtigated by Juſtinian to repeal the law which prohibited perſons of ſenatorial rank from uniting themſelves with actreſſes, to prepare the way for his marriage with Theodora, the moſt public and abandoned of proſtitutes[u]; and after he ſucceeded to the empire all the reſtrictions of the Papian Poppœan law, and of Conſtantine, were ſwept away by a ſeries of conſtitutions[w]. He decreed likewiſe that age ſhould be no impediment to matrimony[x], but the unnatural marriage of eunuchs ſtill continued to be practiſed even under the Chriſtian emperors, till it was totally prohibited by Leo[y].

It

[t] L. 1. C. De Nat. Lib. [u] L. 23. C. De Nupt. Procop. Anecd. p. 45. [w] Novel. 89. c. 15. 78. c. 3. 117. c. 4. 6. [x] L. 27. C. De Nupt.

[y] Juvenal. Quum tener uxorem ducat ſpado.

a. The children of concubines.

Concubines permitted by Law.

It was the profeſſed object of marriage to ſupply the ſtate with citizens, and theſe reſtrictions were calculated to preſerve the purity of the Roman blood, and the diſtinctions of rank and family. But it was thought expedient to make ſome allowance for the frailty of human nature; many perſons might be deſirous of enjoying the conſolation and domeſtic cares of an amiable female, who were unwilling to hazard

Claud. in Eutrop. l. 2. 88.

Si quid portentis creditur, uxor
Mulcebat matres epulis, et more pudicæ
Conjugis eunuchi celebrabat vota mariti.
Hanc amat, &c.

Nov. Leon. 98. This conſtitution affords a true example of the argumentative and declamatory ſtyle which falſe taſte introduced into the laws of the lower empire; ſo different from the conciſe and elegant ſimplicity of the earlier periods. Amongſt a multiplicity of reaſons againſt the marriage of eunuchs is the following curious compariſon: Ειτα ϗ χωρὰν μεν, ἐξ ἡς αν τις ἑτερος καρπον δρεψαιτο, ει τις ὀφθειη διαλυμαινομενος, ϗ προς το ακρον, (probably a corrupt reading for ακχηστον, the word having been written contractedly ακρον, or according to the conjectures of H. Stephens and Agylæus, αργον), αυτὴ χρωμενος, ὡς πονηρον ϗ λυμεωνα μισησομεν, και, ει δυνατοι, ἐρεξομεν αυτης την προαιρεσιν· τον δ' ει τις ἐξ ἡς ὁ λογικος αναβλασταν σαχυς, χωραν ἐξηρημενον ϗ ακχηστον δεικνυσι, τουτω ὡς μηδεν ἀδικον δ̓ωμεν παραχωρησομεν;

the

the expence and burden of a ſolemn engagement, and concubinage was therefore acknowledged, and allowed, as an intermediate ſtate between the dignity of marriage, and the profligacy of meretricious amours [z]. This connexion every unmarried man was at liberty to form with one ſingle woman [a], and no other reſtraints were impoſed than thoſe which were founded in nature, and the diſapprobation of polygamy. No one was allowed to take a miſtreſs, who was related to him within the degrees of conſanguinity [b] which conſtituted inceſt, or during the immature period antecedent to puberty [c]. Upon the ſame principles, ſons were forbidden to take to wife the concubine of their father [d]. It has been thought that married men were firſt prohibited from keeping concubines by Conſtantine [e]; but it appears from a paſſage

Laws relating to them.

[z] L. 49. § 4. ff. De Legat. 3. l. 5. C. ad S. C. Orphil, l. 144. De Verb. Sig.

[a] Nov. 18. c. 5.—89. c. 12. § 5.

[b] L. 1. § 3. ff. De Concub. l. 56. ff. De Rit. Nupt.

[c] L. 1. § 4. ff. De Concub. [d] L. 4. C. De Nupt.

[e] L. un. C. De Concub. L. ex ea. 121. § 1. Mulier, ff. De. Verb. Obl.

in Julius Paulus [f] to have been the eſtabliſhed law in the reign of Severus. With only theſe exceptions, a man was at liberty to take as his concubine any of thoſe perſons with whom he was forbidden to marry [g].

A doubt reſpecting an opinion of Heineccius.

It is expreſsly ſaid, in the Digeſt and Code, that concubinage was known to and eſtabliſhed by the laws [h]; but I am by no means ſatisfied with the ſuppoſition of the learned Heineccius [i], that it was introduced and rendered legal by the Papian Poppæan law. 1. It ſeems hardly probable that a law, which was intended even to compel marriage, ſhould have directly promoted a practice which had the ſtrongeſt tendency to encourage celibacy. 2. The general words,

[f] Recept. Sen. 11. 20. Eo tempore quo quis uxorem habet, concubinam habere non poteſt. L. 3. C. Com. de Man. Ulpian in l. 11. § 2. ff. De Divortiis.

[g] The whole title, ff. De Concub. l. 16. De his quæ ut indig. l. 38. p. ff. De Reb. auct. Jud. poſſ.

[h] L, 3. § 1. ff. De Concub. Quia concubinatus per leges nomen aſſumpſit, extra legis pænam eſt, l. 5. C. Ad. Sen. Orfit. Licita conſuetudo.

[i] Ad. Leg. Pap. Pop. lib. 11. cap. 4.

per

*per leges*, do not neceſſarily refer to that law in every caſe, though they poſſibly may be ſo underſtood in many paſſages, which immediately relate to the ſubject of marriage. 3. Neither does it follow from this, that Ulpian and Paulus have treated upon concubinage, in their commentaries upon that law; unleſs it can be proved that commentators never digreſs from the ſubject which they are profeſſedly writing upon to other topics of a kindred, or even of a diſſimilar nature. In the diſcuſſion of a multifarious law relating to marriage, many queſtions ariſing out of the collateral ſtate of concubinage would unavoidably preſent themſelves for conſideration; and there is no paſſage in the only two remaining fragments relating to that head, in thoſe treatiſes [k], from which it can be directly inferred that there were any proviſions of that kind in the law itſelf. 4. The exiſtence of ſuch a clauſe eſcaped the reſearches and conjectures of Gothofred and Gravina, though they were familiar

[k] L. 1. & L. 2. ff. De Concubinis.

with the quotations which are adduced in proof of it.

Their rights.

But by whatever laws this ſtate was eſtabliſhed, they muſt have been merely of a negative or permiſſive nature, for it was followed by no legal conſequences, and created no new rights. With whatever reſpect the name of a concubine might be treated, ſhe acquired none of the advantages or diſadvantages of a wife. The intimate union of property, and the participation in the ſacred rites of the huſband's family, indeed, were confined ſolely to the ſolemn marriages by co-emption, confarreation, and preſcription, but ſhe had none of the other privileges of the more uſual kinds of matrimony. If ſhe embezzled the goods of her keeper, ſhe was liable to an action of theft, from which a wife was exempt[l]. Donations were valid between them to any extent[m]. She retained her proper domicil

[l] L. Si Concubina, 17. ff. De Action. Rer. Amot.

[m] L. 31. ff. De Donat.

and

and forum, whereas a wife was transferred to thoſe of her huſband [n]. None of the laws relating to marriage portions applied to them, and the connexion might be diſſolved at pleaſure, even without the eaſy forms of a divorce. If indeed the union was of ſuch an honourable nature, that the woman did not forfeit the reſpectable title of a matron, as where a freed-woman was concubine to her patron, in caſe of her infidelity, he might inſtitute an accuſation of adultery, upon the Julian Law [o]; not indeed jure mariti, but jure extranei. But the only caſe mentioned in the law, in which this took place, was that of a patron and his freed-woman, which ſeems to have been favoured beyond every other kind of concubinage. And Giannone is not ſupported by the paſſage which he quotes, when he aſſerts generally that adultery might be committed by concubines, as well as wives, and that the only difference conſiſted in the mode of

[n] L. 22. § 1. L. 37. § 2. ff. Ad Municipal. L. 65. ff. De Judic.

[o] L. 13. ff. Ad Leg. Jul. de Adul.

accu-

accuſation [p]. So if a ſlave was retained in that capacity by her maſter, ſhe acquired her liberty at his death without manumiſſion [q]; and it appears by a fragment of Ulpian, which has not found its way into the digeſt, that in his time, when a man's goods were ſold under the ſentence of a court, his concubine and natural children were excepted [r].

Concubinage abolished by Leo.

Concubinage maintained its ground during the republic, the heathen emperors, and for a long period after the eſtabliſhment of Chriſtianity. It was finally aboliſhed, in the Eaſtern empire, by the emperor Leo the ſixth, in the ninth century, as an offence not only inconſiſtent with religion, but contrary to nature. "Why," ſays the philoſophic monarch, "ſhould a man prefer

[p] Non meno nelle mogli, che nelle concubine, potea conſiderarſi adulterio, ma la differenza conſiſteva nel modo di accuſarſi, i. e. either, jure mariti, or jure extranei, p. 168.

[q] L. ult. C. Commun. de Manumiſs.

[r] Bonis venditis, excipiuntur concubina et liberi naturales, lib. 1. tit. 13.

muddy

"muddy water when he may ſatisfy his "thirſt from the pure ſtream[s]?" How far his conduct was conformable to his laws and doctrines, may be ſeen in the hiſtorians of his life.

Rights and incapacities of baſtards.

The offspring then of all theſe different conjunctions, of illegal marriages, concubinage, or promiſcuous amours, were comprehended under the general appellation of baſtards, ſpurii, or nothi. Different names or epithets diſtinguiſhed the concubinage, the proſtitution, the inceſt, or other modes of illegal union of the parents, but I apprehend that the children, before the time of Conſtantine, had all, without diſtinction, the ſame general rights and incapacities[t].

To aſcertain theſe rights and incapacities, it is neceſſary to diſtinguiſh their condition

[s] Novel. Leon. 91. Οθεν, ἐξον καθαρων απαρυσθαι καμαλων, συ προκρινεις τον βορβορον;

[t] It is to inferred from l. 6. ff. De Decur. Hotman. de Spuriis, p. 500. Quinque ſpuriorum genera æque omnia probabantur veteri jure.

before

before the time of Conſtantine, the alterations which then took place, and afterwards, till the law was finally ſettled by Juſtinian.

Before Conſtantine.

The legal condition of baſtards during the firſt period flowed naturally from two principles: firſt, that the law did not recognize any connection whatever between the father and the child; but, in the ſecond place, the relation ſubſiſting between the mother and her offspring was acknowledged as perfectly as in the caſe of legitimate children [u].

1ſt Principle. No connexion with the father.

The ground of the firſt principle aroſe, not only from the general policy of encouraging marriage, but likewiſe from the uncertainty of the perſon. He only could be conſidered as the father, who was demonſtrated to be ſo by the rites of matrimony. When an inheritance was bequeathed to Claudius, an illegitimate child, if he could prove himſelf to be the ſon of the teſtator,

[u] Inſt. lib. 3. tit. 5. § 4. L. 19. 23. 24. ff. De Statu. L. 2. 4. 8. ff. Unde Cog. &c. &c.

Paulus

Paulus was of opinion that the bequeſt was void, becauſe the condition was impoſſible to be performed [w].

From hence it followed that the very extraordinary paternal power, which was peculiar to Roman fathers, did not extend to their illegitimate children. If they enjoyed, or exerciſed any authority, it aroſe from natural affection, and the influence of a dependant ſituation.

The father was not compellable to endow his natural daughter [x]. If he died inteſtate, his natural children could inherit no part of his property. He had no power of appointing guardians for them, becauſe that right depended upon the paternal autho-

[w] L. 83. ff. De Condit. et Demonſt. Lucius Titius ita teſtamentum fecit, "Aurelius Claudius natus ex illa mu-"liere ſi filium meum ſe eſſe judici probaverit, hæres "mihi eſto." Paulus reſpondit, filium de quo quæreretur, non ſub ea conditione inſtitutum videri, quæ in poteſtate ejus eſt, et ideo teſtamentum nullius eſſe momenti.

[x] Inferred from L. 41. § 11. ff. De Legat. 3.

rity [y]. Neither could the agnates, or the relations on the father's ſide, be entitled to the legal guardianſhip [z]; becauſe, the firſt link failing, the chain of conſanguinity was entirely broken, and no agnation ſubſiſted. But the Atilian law, which directed the proper magiſtrates, where there was no teſtamentary, or legal guardian, to appoint one, and the further regulations upon that head extended no doubt to natural children [a]. With reſpect to marriage the laws of nature, and decency were obſerved, and the prohibition of inceſt comprehended the illegitimate as well as the legitimate relations within the ſame degrees [b].

But theſe incapacities were carried no further. The free right of diſpoſing of his

[y] Inſt. l. 1. 13. § 3. De Tutelis. L. 1. ff. De Teſtamentaria tutela. L. 40. fin. ff. De Adm. Tut. L. 7. id. De Confirmando Tutore.

[z] L. 3. C. Quando Mulier. in fin. Legitima tutela evaneſcit. L. 4. ff. Unde Cogn. Inſt. 3. 5. § 4.

[a] Inſt. 1. 20. § 6. L. Ult. C. qui pet. tut.

[b] L. 54. l. 14. § 2. ff. De Ritu Nupt.

pro-

property, which every citizen enjoyed by the law of the twelve tables, was not infringed upon in this caſe. He was at liberty to provide for them or his concubine, either in his life time, or by will to any extent, with no other reſtrictions than thoſe which applied to all ſtrangers to his blood in general [c].

2d Principle. Connexion with the mother perfect.

On the contrary the relationſhip to the mother was perfect and complete in every reſpect.

As to her condition.

She communicated to them her condition or ſtate in ſociety [d]. If the unfortunate offspring of a female ſlave were the property of her maſter, the children of a free woman, whoever might be the father, or however diſapproved, or even prohibited the connexion, inherited from her all the rights and prerogatives of a Roman citizen [e]. No infamy or legal blemiſh attached to the ille-

[c] This is clear from L. 45. Lucius. ff. De Vulg. Subſtit.

[d] L. 24. ff. De Statu.

[e] Inſt. l. 1. tit. 4. L. 5. L. 19. ff. De Statu.

gitimacy

gitimacy of their birth, they were capable of taking by will [f], and were not even diſqualified for holding the moſt honourable offices in the ſtate [g], though in the competition between the candidates they who could boaſt a more virtuous origin were intitled to the preference [h]. For it was humanely obſerved that they who were ſufferers by the fault of others were deſerving of compaſſion rather than puniſhment.

Her property.

As to the ſucceſſion to her property they were preciſely upon the ſame footing with legitimate children, and ſucceeded equally with them.

[f] L. 45. ff. De Vulg. Sub. L. 17. § 1. ff. Quæ in Fraud. Cred.

[g] Amongſt Gruter's Inſcriptions, p. 434. is a monument to the memory of C. Mamercius Januarius, who is ſtyled ſine patre filius, and filius naturalis, and yet ſucceſſively enjoyed the honors of Quæſtor, Ædile, Prætor, and Duumvir in his colony.

[h] L. 6. L. 9. L. 3. § 2. ff. De Decurion. L. 14. § 3. ff. De Muner. et Honor.

By

By the laws of the twelve tables all ſucceſſion to the eſtate of inteſtates was confined to the narrow limits of ſuch children only as were under the power of the parent, from whom they claimed an inheritance, and of agnates, or ſuch kindred as were related in the male line only. It followed that mothers and their children could not reciprocally ſucceed to each others property, or the children to their relations on the mothers ſide. A remedy, however, was applied by the Prætor, whoſe office it was to relax the harſh rules of ſtrict law by the milder principles of equity. He could not indeed veſt in them the legal eſtate, which the law had denied, but he admitted them to the *poſſeſſio bonorum*, a ſort of poſſeſſory right, which in effect was equally beneficial, and which he extended to illegitimate as well as lawful children [1]. In ſucceeding times, this Prætorian was converted into a legal title by the Tertyllian and Orphitian decrees of the ſenate, in the reigns of Hadrian and Antoninus, and by other laws

[1] L. 2. 4. 8. ff. Unde Cogn. Inſt. lib. 3. tit. 5. § 4.

and conſtitutions, in which illegitimate children were likewiſe included [k].

In other reſpects.

So if their mother omitted them in her will, or diſinherited them without juſt cauſe, and did not leave them a legitime portion, they might inſtitute a ſuit to annul the inofficious teſtament [l]. She was obliged to apply to the magiſtrate for the appointment of a tutor to her children, in the ſame manner as if they were legitimate [m], and they were equally bound by the reciprocal duties of maintenance [n]. Except in very particular caſes, of which the Prætor was to judge, it was thought inconſiſtent with the duty of a child to bring an action againſt its parents. The ſame reverence was enforced, and the ſame prohibition was extended to the natural mother, though perhaps not to the father [o].

[k] L. 5. C. Ad S. C. Orphit. in fin. L. 1. § 2. ff. Ad Sen. Tertyll. L. 2. L. 18. ff. De Bon. Libert.

[l] L. 29. § 1. ff. De Inoff. Teſt.

[m] L. Ult. C. Qui pet. tut.

[n] L. 5. § 4. De Agn. lib.

[o] L. 4, 5, 6. ff. De In Juſ. Vocat.

If

How far the consent of parents was required to their marriage.

If it be asked how far the consent of parents was required to the marriage of bastards, a little consideration of the law, in that respect, concerning legitimate children, will enable us to give a satisfactory answer. In these, a distinction must be made between sons and daughters. As to the first, the necessity of the father's consent being solely founded upon his paternal power [p], it was only commensurate with it. And his approbation was dispensed with after three years captivity, or absence without being heard of, and might be supplied by the magistrate, in case of madness, or even of an unreasonable refusal [q]. When the paternal power was dissolved, by emancipation, or other means, the son became perfectly his own master, the arbiter of his own destiny in the matrimonial connexion [r]. After the father's death, the consent of the tutor was quite out of the question, as to the validity

[p] Inst. De Nupt. L. 2. ff. De Rit. Nupt.

[q] L. 25. C. De Nupt. L. 9, 10, 11. ff. De R. N. L. 19. ff. eod.

[r] L. 25. ff. eod.

of a contract which could not be entered into till the age of puberty, when his authority became totally extinct; nor was that of curators required, whose office might then commence, since their power was limited to the care of the minor's property only, and did not affect his personal liberty[s]. The mother was not at all consulted either during the life, or after the death, of the father[t].

The

[s] L. 8. C. De Nupt. L. 20. ff. De Rit. Nupt.

[t] 10 Inst. De Adopt. I cannot help noticing a passage in Sir William Blackstone's Commentaries, book the first, chapter the seventeenth, in which he gives an account of the civil law relating to tutors and curators. He says, "The guardian with us performs the office both of the "*tutor* and *curator* of the Roman laws; the former of "which had the charge of the maintenance and educa- "tion of the minor, the latter the care of his fortune; "or, according to the language of the court of chan- "cery, the *tutor* was the committee of the person, the "*curator* the committee of the estate. But this office "was frequently united in the civil law; as it always is in "our law with regard to minors." But it is perfectly clear; *first*, that the authority of a tutor necessarily expired when the infant arrived at years of puberty; that of a curator might then commence, and continued till twenty-five.

The amiable facility of the female ſex required a longer continuance of the parental care. Amongſt the laws indeed upon this head, as they now ſtand in the Code of Juſtinian, there are ſome contradictions, which have occaſioned conſiderable perplexity amongſt the commentators. The difficulty has ariſen from a ſuppoſition that, at whatever periods the reſpective conſtitutions there introduced may have been originally promulgated,

five. "Pupilli cum puberes eſſe cæperint a tutela liberantur. "L. 1. C. Quando tut. vel cur. eſſe deſinunt." *Secondly*, that the tutor had the entire management of the infant's property, as well as of his perſon. See all the titles relating to this ſubject, from which theſe laws may be ſelected. "Datus tutor ad univerſum patrimonium datus eſt. L. 21. "ff. De Excuſat. Tutor domini loco haberi debet. L. 27. "ff. De Adminiſt. Tut. Cum tutor non rebus duntaxat ſed "etiam moribus pupilli præponatur. L. 12. § 3. De Adm. "Tut. A tutoribus, &c. pupillorum eadem diligentia exi-"genda eſt circa adminiſtrationem rerum pupillorum quam "paterfamilias rebus ſuis præſtare debet. L. 33. eod. tit. "Inventario facto res ei traduntur. L. Ult. § 1. C. Arbit. "Tut." *Thirdly*, that no curator was ever appointed whilſt there was an effective tutor; and only in the caſes of his incapacity, abſence reipublicæ cauſa, when he was excuſed,

mulgated, they all acquired a new, equal, contemporary authority from this republication. The evident oppoſition between them has been accounted for, by taking a diſtinction between advice, and poſitive injunction, and by ſuppoſing that the conſent of certain perſons, required by one law, which another declares to be perfectly needleſs, was directed to be obtained, for the ſake of decency only, and not as of legal neceſſity. But this interpretation can ſcarcely be admitted, becauſe it is the office and language of laws not to counſel, but to

ſuſpected, removed, baniſhed, or the property was too extenſive to be managed by one perſon. "Officium tutorum curatoribus conſtitutis finem accipit. L. 19. ff. De Auct. Tut. Curator pupillo non datur ſi tutor eorum afſuerit. L. 11. ff. De Tutor. et Curat. Interdum pupilli curatores accipiunt, ut puta, ſi legitimus tutor non ſit idoneus. Inſt. § 5. De Curat." The other caſes are under the title, In quibus caſibus, Code. It is incorrect, therefore, to repreſent the two offices as ſubſiſting at the ſame time, with powers contradiſtinguiſhed and compatible with each other; nor could they have ever been united, unleſs it were poſſible that the ſame perſon could be under the age of puberty, and above it at the ſame time.

command; and the knot perhaps may be better unravelled by attending to the dates of the conſtitutions, and admitting the principle, that prior laws are repealed by thoſe which are enacted later[a]. This rule muſt neceſſarily be underſtood to apply to many parts of that collection; and where a former conſtitution is inſerted, which is evidently repealed in the whole, or in part, by another ſubſequent law, the compilers muſt be taken to have given it no further validity than is conſiſtent with ſuch total, or partial, abrogation; valeat qua valeat. In one inſtance this principle is expreſsly allowed by the legiſlator himſelf. A conſtitution of Anaſtaſius, which forms the ſixth law under the title concerning natural children, was completely repealed by a conſtitution of Juſtin, which compoſes the law next following. They are both thus inſerted into the Code, but that the firſt did not thereby revive, and acquire an equal authority with the latter, but continued as

[a] Αι μεταγενεστεραι διαταξεις ισχυροτεραι των προ αυτων εισιν.
MODESTINUS.

an abrogated and obſolete law, was expreſsly declared long afterwards in the eighty-ninth novel [w]; which aſſigns a reaſon why they were both ſuffered to remain notwithſtanding, which was, that many families founded their legitimacy upon the effects of that law whilſt it continued in force.

It ſhould ſeem then, that, by the elder laws [x], as in the caſe of ſons, no other conſent was neceſſary to the marriage of daughters, than that of the father, and that only whilſt the child was under his power; and it was expreſsly declared, that the conſent of relations was in no caſe neceſſary. But, under ſubſequent conſtitutions [y], beſides the regular paternal authority, a girl, under twenty-five years of age, who was

[w] Cap. 7.

[x] Paulus, L. 2. ff. De Rit. Nupt. in the time of Alexander Severus, about A. D. 222.—L. 8. C. De Nupt. of Gordian, about A. D. 238.

[y] Of Valentinian, Valens, and Gratian, A. D. 371. L. 18. C. eod. and L. 1. C. Theod. de Nupt. Of Honorius and Theodoſius, about A. D. 408. L. 20. C. eod.

eman-

emancipated, could not marry without her father's conſent, even if ſhe was in a ſtate of widowhood; unleſs, indeed, in that ſituation ſhe had obtained the jus liberorum; till that age, likewiſe, if the father was dead, the conſent of the mother [z], and of the neareſt relations, was requiſite. In caſe neither parent was in exiſtence, the advice of thoſe relations ſeems to have been called in; and if they were unable to decide upon the claims and merits of the rival competitors for the fair hand of a minor, who was too modeſt to declare her own par-

[z] During the father's life the mother had no power of diſſenting; in theſe lines, therefore,

At tu ne pugna cum tali conjuge, virgo;
Non æquum eſt pugnare, pater cui tradidit ipſe,
Ipſe pater cum matre, quibus parere neceſſe eſt.
Virginitas non tota tua eſt, ex parte parentum eſt,
Tertia pars matri data, pars tertia patri,
Tertia ſola tua eſt———————

the poet Catullus muſt be ſuppoſed to refer to a natural, not a legal, authority, agreeably to the opinion of Modeſtinus. L. 42. ff. De R. N. Semper in conjunctionibus non ſolum quid liceat conſiderandum eſt, ſed et quid honeſtum ſit,

tialities,

tialities, the choice was referred to the magiſtrate [a].

Whilſt the office of perpetual tutor was in uſe, his conſent was, of courſe, neceſſary at every age; that of the ordinary tutor was required to the validity of the eſpouſals of his ward, who was neceſſarily under the years of puberty [b]; but the female, as well as the male pupil, was always free from any authority of her curator, upon this head [c].

It follows therefore that the conſent of neither father nor mother was neceſſary to the marriage of their illegitimate ſons, becauſe they were not under the paternal power, which was the only ground of that reſtriction. But though daughters were totally independent of their natural fathers, yet by analogy to the laws relating to legi-

[a] Si inter honeſtos competitores matrimonii oriatur forte certamen, &c. ſi puella cultu verecundiæ propriam noluerit voluntatem depromere, &c.

[b] L. 1. C. eod.

[c] L. 20. ff. De R. N. L. 8. C. De Nupt.

timate

timate children, from the maternal and filial relations, which appear in every other inſtance to have been as ſtrongly inforced as in the caſe of legitimate children, and from the uncommon anxiety of theſe laws to provide a proper protection for women, I am inclined to think that the mother, and the relations on her ſide, had the ſame right of prohibiting improper connexions, as in reſpect to lawful daughters.

Changes by Conſtantine.

Such was the ſimple and rational ſyſtem with reſpect to illegitimate children, which prevailed during the republic, and the reigns of the heathen emperors. But after the precepts of religion, both in faith and morals, became an ingredient in the laws and regulations of the empire, not only the impolicy, but the ſinfulneſs of actions, was conſidered, and the degrees of wickedneſs were more nicely diſtinguiſhed. Every kind of licentious love was to be prohibited, or at leaſt diſcouraged, as far as the manners of the times would allow; and whilſt charity required that the unoffending offſpring ſhould

ſhould not be left deſtitute of a maintenance, the current of parental affection was not permitted to flow through an illegal, in preference to the lawful channel, and only in meaſured ſtreams. The conſtitutions of Conſtantine relating to baſtards are no longer extant; but as far as the learned Gothofred can perceive[d], through the obſcure darkneſs in which the ſubject is involved, they could take nothing under their father's will, if there ſubſiſted any legal deſcendants—a father, or a mother, brothers or ſiſters, paternal uncles, or any relation in the line of agnates. In caſe of a total failure of theſe kindred, their former unlimited capacity continued.

Subſequent alterations.

The laws of Conſtantine were a little relaxed by Valentinian the elder. If a man had lawful ſons, or grandſons, a father or a mother, he could leave to the extent of one twelfth part of his property to his natural children, and their mother. But, even if

[d] In Cod. Theodoſ. Lib. 4. tit. 6. De Naturalibus filiis.

none

none of these were in being, his kindness was farther restricted to a bequest of the fourth part of his wealth [e].

These regulations were altered, repealed, and revived again, by the emperors, Arcadius and Honorius [f], Valentinian the third, and Theodosius the younger [g]; till, after various changes and fluctations [h], according to the usual practice of that legislator, they were finally settled in a single constitution by Justinian, in the following manner [i].

Finally settled by Justinian.

With respect to the father, if he had lawful issue, he could give or bequeath only a twelfth part [k] of his property to his bastards and their mother; if the children were dead, a twenty-fourth part only to his concubine [l]. If he had no lawful children, he

[e] In Cod. Theodos. Lib. 4. tit. 6. De Naturalibus filiis.

[f] L. 2. C. De Nat. Lib.

[g] C. Theod. eod. & Gothofred in loc.

[h] L. 8. C. De Nat. Lib. Nov. 18. c. 5. L. 12. C. eod. tit. [i] Nov. 89. c. 12—15. [k] Μιαν ογκιαν.

[l] Ἡμιογκιον.

might

might leave them the whole[m]; deducting however their legitime portion, or one third, for his relations in the aſcending line, if either of them were living[n]. In caſe of inteſtacy, where there were a wife and a legitimate offspring, his ſpurious children were entitled only to a reaſonable maintenance[o], and they were admitted to one ſixth, when there was no wife, or lawful children[p]. The ſucceſſion between the father and his children was reciprocal[q], and he could appoint a tutor for the property he gave or left according to the laws; but the appointment was to be confirmed by the magiſtrate[r].

But the benefit of theſe laws was extended only to the iſſue of lawful concubines. That is, where a ſingle man formed a permanent connexion with one unmarried woman, who was conſidered as an inferior wife[s]. The

[m] Δωδεκα ογκιας. [n] Cap. 12. § 3. [o] § 6.
[p] § 4. Δυο ογκιας. [q] Cap. 13.
[r] L. 4. C. De Conf. Tut. Nov. 89. c. 14.
[s] Nov. 89. c. 12. § 5.

children

children of nefarious, inceſtuous, or prohibited connexions, were refuſed even a maintenance [t].

The full ſucceſſion to the mother continued without reſtriction, with one exception only. If an illuſtrious woman had children by lawful marriage, and others that were ſpurious, the latter were incapable of taking any thing from her either during her life, by her will, or as heirs in caſe of inteſtacy. This law ſhews the profligacy of the times by the neceſſity of ſuch a regulation [u].

But the greateſt innovation in the laws of baſtards was in the introduction of legitimation. We have already ſeen Conſtantine deterring perſons from concubinage by pu- Legitimation. 1. By marriage.

[t] Nov. 89. c. 15. Πας ὁ ἐκ συνελευσεων (ου γαρ καλεσομεν γαμους) η νοθειων, η ἑταιρων, η δαμαλων προιλθων, ἐιτος ουδε φυσικος ονομασθησεται, ουδε απολειφθησεται απο των γονεων.

Nov. 74. c. 6. Ετω κ᾽ τουτο τιμωρια των παιζοντων (perhaps παιδιων, an error from the contraction in the MSS. παιδ̃ων) το γινωσκειν ὡς ουδ᾽ ὁτιουν ὁι της αμαρτανουσης ἑνθυμιας αυτων ἐξουσι παιδες.

[u] L. 5. C. Ad. S. C. Orfit. Nov. 74. Princip. in fine.

niſhing

niſhing them in their parental feelings by the neceſſary poverty of their children, for whom, in many caſes, they could make no legal proviſion. In purſuance of the ſame deſign, to induce thoſe who were living in that ſituation to convert an impure into a lawful connexion, he enacted, that if a man had children by a woman in a ſtate of concubinage, by a ſubſequent marriage with the ſame perſon they became legitimate to all intents and purpoſes [w].

This conſtitution comprehended only ſuch children as were then in being, and did not extend to future caſes, nor was it to take effect where there were any legitimate children. A ſimilar law, equally limited, was paſſed by Zeno [x]. It was in the reign of Anaſtaſius [y], that this benefit was firſt rendered general and proſpective; and though it was in ſome degree reſtricted by Juſtin [z], it was again ſtill further extended by Juſtinian, and at length fully eſtabliſhed, after

[w] L. 5. C. De Nat. Lib.
[x] Ead.
[y] L. 6. C. eod.
[z] L. 7. C. eod.

ſeveral

ſeveral alterations [a] and amendments by the eighty-ninth novel, chapter the eighth, which declares, "That if any man ſhall "enter into the marriage contract with a "woman who was originally free, or a "freed woman, with whom it was lawful "to connect himſelf, and who lived with "him as his concubine; whether he was "previouſly the father of any legitimate "children, or not; ſuch marriage ſhould "be legal, and the children, both thoſe "already born, and thoſe in their mother's "womb, ſhould become legitimate; whe-"ther he ſhould have any ſubſequent chil-"dren, or not, or if ſuch ſubſequent chil-"dren ſhould happen to die."

2. By the oblatio curiæ.

After the example of Conſtantine, other leſs perfect modes of legitimation were ſoon invented.—By a conſtitution of Theodoſius the younger, if a man attached his natural

[a] Inſt. Lib. 3. tit. 1. § 2. Lib. 1. tit. 10. in fine. L. 10. L. 11. C. De Nat. Lib. Nov. 12. c. 4. Nov. 18. c. 11. Nov. 19. in tot. Nov. 78. c. 3, 4. Nov. 89. c. 8.

child to the ſervice of the ſenate or magiſtracy of a municipal town or colony (which was called *oblatio curiæ* [b]), he acquired for him to a certain degree the rights of legitimacy. To underſtand the reaſon of this privilege, it muſt be obſerved, that every municipal town or colony was governed by a ſenate, of which the members were ſtyled decurions, and magiſtrates elected from that body. There were beſides a number of perſons inrolled in their regiſters, under the name of *Curiales*, who were liable to ſerve thoſe offices, and to perform other duties, which were extremely burdenſome, expenſive, and even ſlaviſh. Few perſons therefore would voluntarily inliſt themſelves in their number, and in the days of perſecution it was even inflicted as a puniſhment upon the Chriſtians [c]. To compenſate for theſe diſadvantages many

[b] Inſt. Lib. 1. tit. 10. in fine. Lib. 3. tit. 1. § 2. L. 3. L. 9. C. De Nat. Lib. Nov. 89. c. 2—7.

[c] Briſſon. Select. Antiquitat. L. 4. c. 13. For the nature and obligations of theſe offices ſee the whole titles De Decurionibus in the Codes of Juſtinian and Theodoſius. Decuriones and Curiales are clearly diſtinguiſhed in L. 55. C. Juſt.

induce-

inducements were held out, and amongſt the reſt this privilege of Theodoſius. This act might be performed by the father, or other anceſtor, in his life-time, or by will [d]; in which caſe the child became legitimate when he accepted the execution. If his father had no lawful iſſue, a natural ſon might likewiſe obtain this benefit by a ſpontaneous offer of himſelf; and a daughter, under the ſame circumſtances, became legitimate by marrying a man ſo attached to that ſervice [e].

The legitimation by *adoption*, which, however, was only allowed when there were no lawful children, inſtituted by Anaſtaſius [f], was aboliſhed by Juſtin [g], and the abolition was approved and confirmed by Juſtinian [h]. But the reaſon he aſſigned, that unlawful deſires were not to be favoured, ſeemed in- 3. By adoption.

[d] Nov. 89. c. 2.
[e] L. 3. § ult. C. De Nat. Lib.
[f] L. 6. C. De Nat. Lib.
[g] L. 7. C. eod. tit.
[h] Nov. 74. c. 3. Nov. 89. c. 11. §2.

consistent with the introduction of the next two new methods, equally exceptionable.

4. By the rescript of the prince.

By the *rescript of the prince*, upon the petition of the father alleging that he had no legitimate children, and that there were sufficient reasons to justify his not marrying the mother [i].

5. By the will of the father.

By the *will of the father*, under the same circumstances, which however required the confirmation of the emperor; so that in the quaint language of the Novels, it was "the "joint benevolence of the father and the "emperor, that is to say, of nature and the "law [k]."

6. By nomination.

If a man had a son or a daughter by a free woman, with whom he might contract lawful marriage, and in any instrument public or private, subscribed by three cre-

[i] Nov. 74. c. 2. Nov. 89. c. 9.

[k] Ινα καὶ αὐτὸν δωρον ᾖ το γινομενον, παιδοποιᾳ και βασιλεως· Ταυτα δε ἐστιν αμφω, φυσεως τε και νομου. Nov. 74. c. 2. Nov. 89. c. 10.

dible witneſſes, had *denominated* them his children only, without adding that they were his natural children, they were held to be legitimate. But ſince the diſtinction between matrimony and concubinage conſiſted principally in the intention of the parties (whether they united animo maritali), this ſeems to have been rather a rule of evidence to prove a marriage, than of legitimation [l].

None of theſe ſpecies of legitimation could take place with reſpect to any children of a criminal commerce; they all ſuppoſe the iſſue of a concubine, with whom a lawful marriage might be contracted [m]. That by the oblatio curiæ was the leaſt effectual; it communicated no general rights of agnation, for the children ſucceeded to no relations in the paternal line; but the father, or other anceſtor, who had obtained this privilege for them, and even then only to ſuch parts of their property as were ſituated within the territories of the town to which they

[l] Nov. 117. c. 2.

[m] L. 3. 7. C. De Nat. Lib. Nov. 74. c. 6.

were attached; nor could they give or bequeath more to them than to their lawful children [n]. If there were any lawful children in being, baſtards could only be rendered legitimate by marriage, or the oblatio curiæ [o].

The paternal power, in its full extent, was the immediate conſequence of legitimation; but it was not thought right that a father, by his own act only, ſhould acquire an authority ſo extenſive, over perſons not originally ſubjected to him by the laws. It was expreſsly provided, therefore, that in every caſe the conſent of the children themſelves ſhould be indiſpenſably requiſite; and that if the inclinations of a numerous family in that reſpect were various, the benefit ſhould be confined only to thoſe who were willing to accept of it [p].

[n] L. 9. C. De N. L. Nov. 89. c. 4. Gothofred and Bartolus ad loc.

[o] Nov. 89. c. 11.

[p] Ead. Ηικα και οι παιδες τουτοις χαιρουσιν. Even in the caſe of a ſubſequent marriage. Ειτε δια της των περσωπων συμβολαιων ποιησεως. L. 11. ff. De his qui ſui vel. al. Jur.

It

It was the introduction of the mode of legitimation by a ſubſequent marriage, through the medium of the canon law, which was ſo vehemently rejected by our brave anceſtors at the parliament of Merton, and which drew from them the celebrated declaration—"Quod nolunt leges Angliæ mu-"tare, quæ hujuſque uſitatæ ſunt et appro-"batæ [q]." Their refuſal was not without good reaſon. The policy of the Engliſh law upon this head, is greatly ſuperior to that of the Roman code. But we have already obſerved, that legitimation was unknown to the Roman law, whilſt it ſubſiſted in its primitive perfection, during the republic, and as long as the empire retained the ſpirit and vigour of the republican inſtitutions. It was introduced in the decrepitude of their legiſlation; and, at firſt, with an effect merely retroſpective, to enable thoſe, who had already children ſo improperly born, to repair their fault, and not ſuch as ſhould keep concubines in future.

The introduction of legitimation oppoſed in the parliament of Merton.

[q] 20 Hen. III. c. 9.

But perhaps the violence which the barons ſhewed upon that occaſion was not ſo much owing to the goodneſs, or badneſs, of the meaſure itſelf, as to their well-founded fears of the power of the clergy. They knew their influence over the minds and conſciences of men, their extenſive power, and poſſeſſions, and the oppoſition of their intereſts to the conſtitution and liberties of the country. Though the propoſal therefore was artfully calculated, by falling in with the paſſions of many of the barons, to reconcile them to the civil law, they were juſtly alarmed at any attempt to introduce gradually a code, of whoſe contents they were ignorant, and whoſe application that body might direct to their own purpoſes. From the ſame excellent motives were derived their affected hatred of the civil law itſelf, and their extreme jealouſy of the eccleſiaſtical courts.

The ground for theſe apprehenſions is now happily removed. At the reformation, the authority of the Pope, and the exor-

exorbitant power of the clergy, were deſtroyed; but I fear that the notions and prejudices which they occaſioned are not yet totally eradicated. Some traces of them are ſtill to be ſeen occaſionally, in a little harſhneſs, and want of liberality, towards the eccleſiaſtical courts, which have been ſometimes diſplayed in a kindred profeſſion from the days of my Lord Coke to the preſent. If theſe prejudices were confined to a few buſtling minds, which could not help looking aſkaunt at ſome ſmall, though not totally unfruitful, ſpots, which were cultivated without the aſſiſtance of their talents and induſtry; or if a ſort of unconſcious *maladie du metier* ſhould even procure them a more extenſive influence, it would be nothing more than what might be reaſonably expected; but every one cannot but lament to find ſuch ſentiments occupying a place even in the breaſts of wiſe, great, and good, men.—Of thoſe, whoſe ſuperior information muſt have taught them, that thoſe courts are only nominally eccleſiaſtical, and that, though proceedings are carried on in their name, the clergy

clergy have in reality little to do with them; —that, in truth, they are peculiar tribunals, intruſted with the adminiſtration of a certain portion of the laws of the country; that they are an integral part of the legal conſtitution of Great Britain, co-eval with the very exiſtence of that conſtitution itſelf. —That they are not guided in their deciſions by the civil law, nor yet by the canon law, (except ſo far as it is recognized by our municipal legiſlature,) but by a peculiar ſyſtem of their own, founded originally in thoſe laws, regulated occaſionally by the ſtatutes of the realm, and the judgments of other courts of juſtice, which may be conſidered as their written law; but modulated by their own immemorial practice, and deciſions, which conſtitute a ſort of common, or cuſtomary, law; in itſelf not more diſtinct, or differing more, from what prevails in the courts of common law, and equity, than they do from each other.—That if their forms bear ſome reſemblance to thoſe of the civil law; if their deciſions are the decree of a ſingle, but well-informed judge, without

out the intervention of an honeſt, but frequently ignorant, jury; if their depoſitions are taken in writing by an indifferent examiner, when a witneſs is cool and has time for recollection, when his faculties are not confuſed by a public examination, carried on by ingenious men, whoſe buſineſs it is to take advantage of his embarraſſment to lead him to their own purpoſes; though in theſe and ſome other reſpects their proceedings may differ from thoſe of the common law, they may nevertheleſs not be ill calculated for the inveſtigation of thoſe cauſes which are peculiarly under their juriſdiction, and they are perfectly analogous to the practice of the courts of equity, which like theirs was immediately derived from the civil law; whoſe forms alſo have been adopted even by the High Court of Parliament in their proceedings upon impeachments, on account of their intrinſic excellence, and of their being admirably adapted to promote ſubſtantial juſtice, without involving a queſtion in the nice ſubtleties of pleading[r].

We

[r] My Lord Coke (4 Inſt. p. 4.) deſcribes the maſters in chancery as the civilians aſſiſtant to the Houſe of Lords, and

Hiſtory of concubinage in the Weſt, after the deſtruction of the Roman empire. Originally not condemned by the church.

We have ſeen concubinage retained in the empire, as a legal eſtabliſhment, after the triumph of the Chriſtian religion, and its abolition in the Eaſt by the conſtitution of Leo. That it continued in the Weſt till much later times, was principally owing to the depraved morals, and the oppoſition of the clergy of the church of Rome. It is curious

and as ſuch they were formerly ſometimes conſulted to ſtate the practice of the civil law, that the Lords might form the law of parliament, on the wiſdom of all the conſtitutional law of the realm. Impeachments were commonly carried on in the civil law forms.—See Burke's very able and elaborate Report on Haſtings's Trial in 1794. —"The High Court of Parliament bears in its modes "of proceeding a much greater reſemblance to the courſe "of the court of chancery, the admiralty, and eccleſiaſti-"cal courts, (which are the king's courts too, and their "law the law of the land), than to thoſe of the common "law. The accuſation is brought into parliament at this "very day by exhibiting articles, which your committee is "informed is the regular mode of commencing a criminal "proſecution, where the office of the judge is promoted "in the civil and canon law courts of this country. The "anſwer again is uſually ſpecific, both to the fact and the "law alleged in each particular article, which is agreeable "to the proceeding of the civil law, and not of the com-

"mon

curious to trace their conduct and the progreſs of the ſentiments of that church upon this ſubject. In the earlier ages of Chriſtianity, when celibacy and virginity were eſteemed as the higheſt ſtate of ſanctity and perfection, every kind of union between the ſexes was viewed in an unfavourable light, and marriage itſelf, as well as concubinage, afforded a ſubject for declamation to the preachers of the times. But a practice which was eſtabliſhed by law in the empire,

" mon law. Anciently the reſemblance was much nearer " and ſtronger. Selden, who was himſelf a great orna- " ment of the common law, and who was perſonally en- " gaged in moſt of the impeachments of his time, has " written expreſsly on the judicature in parliament. In his " fourth chapter he lays down the practice of his time, as " well as of ancient times, with reſpect to the proof by " examination ; and it is clearly a practice more ſimilar to " that of the civil than the common law. " The practice " is to ſwear the witneſſes in open houſe, and then to ex- " amine them there or at a committee, either upon inter- " rogatories agreed upon in the houſe, or ſuch as the com- " mittee in their diſcretion ſhall demand." So late as the " trial of Lord Middleſex (1624) the whole courſe was in " a manner the ſame as in the civil law. Depoſitions were " taken and publication paſſed," &c. &c. page 32.

which

which had been permitted under the old teſtament, and was not expreſsly forbidden by the new, was not abſolutely conſidered as ſinful, or unlawful, or as a ſubject for eccleſiaſtical cenſures. Marriage was indeed recommended as a more perfect and blameleſs condition, but much of the ſtrong language which might be quoted referred to illegitimate and prohibited connexions; to ſuch, for inſtance, as were merely temporary, or with improper perſons, or where the parties were married. Even under the ſevere diſcipline of the ancient church, regular concubines were admitted to the rites both of baptiſm and the ſacred table[s]. The apoſtolic conſtitutions, whoever might be their author, or whatever their authority, notwithſtanding their general character of melancholy harſhneſs, decide that the concubine of an unbeliever, if ſhe continued faithful to him, might be baptized[t], and St.

[s] Bingham's Chriſtian Antiquities, lib. 11. c. 5. § 11.

[t] Lib. 8. c. 32. Παλλακη τινος απιστου δουλη, ιδιαν μονην σχολαζουσα, προσδιχεσθω· ει δε και προς αλλως ασελγαινει, αποβαλλεσθω. Labbe, 1. p. 497.

Auguſtine

Auguſtine inclines to the ſame opinion [u]. In another place he expreſsly declares, that where two unmarried perſons continue faithful to each other till death, ſuch a connexion is to be conſidered as a marriage [w]. The firſt council of Toledo, which was held in the year four hundred, under the pontificate of Anaſtaſius the firſt, decreed, that he who had no wife, but only a concubine, ſhould not be excluded from the communion, provided he was contented with the connexion of one woman, no matter whether wife or concubine [x]. They are placed preciſely upon the ſame footing. At a period long ſubſequent, Saint Iſidore, at the latter end of

[u] De fide et operibus, cap. 19. tom. 4. p. 33. De concubina quoque ſi profeſſa fuerit nullum ſe alium cognituram, etiamſi ab illo cui ſubdita eſt dimittatur; merito dubitatur utrum ad percipiendum baptiſmum non debeat admitti.

[w] De Bono Conjugali. c. 5. In Decret. Cauſ. 32. Queſt. 2. c. 6.

[x] Decret Diſt. 34. c. 4. Is qui non habet uxorem, et pro uxore concubinam habet, a communione non repellatur; tantum ut unius mulieris, aut uxoris, aut concubinæ ut ei placuerit, ſit conjunctione contentus.

the

the ſixth or the beginning of the ſeventh centuries, in a compariſon of the law of Moſes with that of Chriſt, obſerves, that the Jews, amongſt whom polygamy was allowed, might have ſeveral wives or concubines, but that the Chriſtians were permitted to have only one wife, or one concubine[y]. Theſe three laſt paſſages are introduced into the Decretum of Gratian, and conſequently formed at that time an effective part of the canon law[z].

The

[y] Decret. Diſt. 34. c. 5. Chriſtiano non dicam plurimas, ſed nec duas ſimul habere licitum eſt, niſi unam tantum, aut uxorem, aut certe loco uxoris, (ſi conjunx deeſt), concubinam.

[z] A. D. 1151. It has been ſaid that Gratian himſelf was a baſtard, and therefore was favourable to perſons of that deſcription. The church of Rome, having admitted the orthodoxy of the council of Toledo, and given an additional ſanction to this particular canon by allowing it a place in the Decretum, has endeavoured to defend it from the charge of approving concubinage, by two diſtinct and contradictory interpretations. 1. Gratian, and the elder doctors, diſtinguiſh two kinds of concubinage, and hold that the canon applies only to that legal connexion which was formed between two ſingle perſons, under a mutual promiſe

The municipal laws of moſt of the principal nations of Europe were not more ſtrict. When the Lombards made themſelves maſters of Italy, after the example of the Goths and other barbarians, they adopted, in a great meaſure, the laws of the conquered people. Concubinage therefore was received amongſt them, with the reſtriction to one object,

Nor by the laws in the Weſt.

promiſe of fidelity, and was to continue for life; and which was to be conſidered as a ſubſtantial, though not a formal, marriage. 2. The ſecond is that given by Ferdinand de Mendoza, a celebrated Spaniſh canoniſt, in a learned and elaborate treatiſe upon the council of Illiberris, addreſſed to Pope Clement the eighth (firſt printed in 1594, and republiſhed by P. Labbe, in his Concilia, vol. i. p. 1009.) and which I believe is adhered to by many modern writers. He diſavows the former explanations in toto; denies that any ſuch diſtinction is known to the councils, the popes, the fathers, the civil lawyers, or even the hiſtorians, and aſſerts that concubinage, under every form, was always condemned by the church. The council therefore, he argues, was far from approving that connexion, or admitting that a concubinary could communicate worthily; but only permitted him to receive the ſacrament on account of the multitude of ſinners of that deſcription, et ſi, he adds, communicare nullo præclaræ conſcientiæ ſtimulo, et Chriſtiano nullo pudore ſuffuſus audeat, communicet,

object, which had been introduced into the civil law, and enforced by the church [a].

The Lombards were ſucceeded by the Franks in Italy, who derived many of their laws from that country, but they made no alteration in this reſpect. The ſame permiſſion, with the ſame limitations, are to be found in the capitulary of Charlemagne [b].

nicet, ſed ſuo periculo et damno. And he quotes Saint Auguſtine for this very indulgence. But I apprehend, 1. That it was always the practice of the church to exclude impenitent ſinners, eſpecially ſuch as were living in the habitual exerciſe of a mortal ſin. 2. The words imply ſomething more than a mere indulgence dictated by neceſſity; for they expreſs no diſapprobation whatever; they ſeem to place concubinage on the ſame footing with marriage, ut ei placuerit; and they ſelect one kind as differing from the reſt, alias vivens abjicitur.—Either of theſe interpretations will ſupport what I have above aſſerted, that concubinage was not cenſured or condemned by the public authority of the church in thoſe early days.

[a] Leg. Long. L. 7. tit. 13. Nulli liceat in uno tempore duas habere uxoress, vel uxorem et concubinam.

[b] Lib. 7. c. 366. tom. 1. Edit. Baluz. Qui uxorem habet, eodem tempore concubinam habere non poteſt, ne ab uxore eum dilectio ſeparet concubinæ.

The

The general practice was in conformity to the laws, and the beſt and moſt pious of ſovereigns in thoſe days made no ſcruple of complying with it. Examples may be ſeen in Ruggiero the firſt, king of Sicily, and Charlemagne himſelf [c].

In theſe middle ages, a cuſtom prevailed, which has been thought to have introduced an intermediate ſtate between matrimony and concubinage; it was called a *Morganatic marriage*. The name denotes its Germanic origin [d]; and it is even yet not quite out

Morganatic marriages.

[c] Charlemagne's concubines were numerous; he had a daughter by one after the deceaſe of Faſtrada; after the death of his wife Luitgardis he conſoled himſelf with four miſtreſſes, whether at the ſame time, or ſucceſſively, is not related; their names were Mathalgardis, Gerſuida, Regina, (the mother of Hugo and Drogo,) and Adeluida.

[d] It was derived from *Morgengabe*, or *Morgengnade*, a morning gift. There was a very ancient and univerſal uſage, amongſt all the German nations, for the huſband to make a preſent to his bride the morning after his marriage, in token of his ſatisfaction. The word occurs in the laws of the Burgundians, Franks, Lombards, Alamanni,

out of uſe in that country, under the appellation of a left-handed marriage; but the earlieſt and cleareſt deſcription of it is to be found in the book of Feuds; though it is there wrongly attributed to the ſalic law, in which no trace of it appears, by a miſtake not unuſual of referring all the cuſtoms of the Franks to that Code*. It is defined to be the lawful, and inſeparable, conjunction of a ſingle man, of noble or illuſtrious birth *only*, with a ſingle woman of an inferior or plebeian ſtation, upon theſe conditions, that

Saxons, and Swedes, and has found its way into England in the laws of Canute, cap. 71. If a widow married within a year after her huſband's death ſhe forfeited her *morgen gyfe*. A morganatic wife was not endowed, as in the caſe of a perfect marriage; ſhe received only her morgengab, which was an inferior proviſion, in lieu of all matrimonial claims.

* Lib. 2. tit. 29. Quidam habens filium ex nobili conjuge, poſt mortem ejus non valens continere aliam minus nobilem duxit, qui nolens exiſtere in peccato, eam deſponſavit, ea lege, ut nec ipſa, nec filii ejus amplius habeant de bonis patris, quam dixerat tempore ſponſaliorum, videndi gratia, decem libras, vel quantum voluerit dare, quando eam deſponſavit; quod Mediolanenſes dicunt, accipere uxorem ad morganaticam, (ſc. legem) alibi lege ſalica.

neither

neither the wife, nor her children, ſhould partake of the titles, arms, or dignity of the huſband, or ſucceed to his inheritances, but ſhould be contented with a certain allowance aſſigned them by the Morganatic contract. But, ſince theſe reſtrictions relate only to the rank of the parties, and the ſucceſſion to property, without affecting the real nature of a matrimonial engagement, it muſt be conſidered in the light of a juſt marriage, of which it has every eſſential character. The marriage ceremony was in general regularly performed, the union was for life and indiſſoluble, and the children in other reſpects legitimate. This connexion was very uſual in moſt countries of Europe; but I cannot find ſufficient proof that the concubines of Charlemagne, and ſome of the early kings of France, were wives of this deſcription; nor is there occaſion to reſort to that ſuppoſition, in defence of their conduct, ſince the ſtate of concubinage itſelf was little inferior to this in the public eſtimation [f].

[f] Heinec. El. Jur. German. lib. 1. tit. 10. § 214. tit. 13.

Began to be condemned by the Pope and councils without ſucceſs in the 11th and 12th centuries.

Hitherto concubinage was triumphant in Europe; and the conſtitution of Leo, by which it had been aboliſhed in the Eaſt, was never received as law in the Weſt. We will now proceed to trace the ſteps of its gradual prohibition by the church, and the ſtill more dilatory and unwilling compliance of the eccleſiaſtics. Upon this occaſion I ſhall quote a paſſage from the maſterly pen of Giannone, which comprehends, in one ſentence, a complete abridgement of the whole hiſtory of the body of the canon law. "What at firſt was only recommended, in the warm rhetoric and ſermons of the fathers, not as a neceſſary part of duty, but as contributing to Chriſtian perfection, gradually became the ſubject of decrees and canons, and was finally rendered matter of compulſion, by cenſures, and excommunications[g]." It was late however before this proceſs was completed with reſpect to the preſent ſub-

[g] Prima ſi cominciava coll' eſortatione e co' ſermoni da' Padri, dipoi ſi veniva a decretarlo per via di canoni, ed, in fine, al conſtringimento per via di cenſure e ſcommuniche. Cap. 10.

ject,

ject, and long ſubſequent to the dates of thoſe laws which regulated uſury, divorces, and tithes; and not till the eſtabliſhment of the celibacy of the clergy became a part of the policy of the court of Rome. The ſame canons which prohibited the marriages of prieſts would neceſſarily be extended to their concubines. They were then conſidered, as in ſome countries they are at preſent, as a ſort of inferior wives. Under pretence of that looſer connexion, the whole intent of the regulation might otherwiſe have been fruſtrated; and the intereſt of the Roman church required that, if poſſible, every family attachment ſhould be prevented. During the tenth and eleventh centuries, unceaſing and vigorous endeavours were uſed to accompliſh both theſe points, and the ſucceſs was ſuch as might have been expected from an attempt to counteract ſome of the moſt potent principles in nature. The unrelaxed continence which was required of a large body ſubject to all the paſſions of humanity, was too unreaſonable to be carried into effect. The clergy reſiſted even forcibly every at-

tempt that was made to aboliſh both marriage and concubinage; and when they were at length excluded from the married ſtate, the more obſtinately they adhered to their miſtreſſes [h]. Councils might declaim, and pontiffs threaten, the clergy were firm in their oppoſition; and there was no man in the ſacred profeſſion, from the biſhop to the loweſt miniſter in the temple, who did not claim, and exerciſe, his privilege of maintaining a concubine in the face of the world [i].

Nicholas II.

Amongſt the reſt, Pope Nicholas the ſecond, exerted himſelf ſtrenuouſly to remedy theſe abuſes. He aſſembled a council at Rome, and another at Amalphi, in the year 1059, where ſevere puniſhments were decreed againſt offenders, and they even depoſed the biſhop of Trani [k].

[h] Id. cap. 13. Gli eccleſiaſtici furono quelli, che oſtinamente ſi oppoſero, reſiſtendo col fatto a tanti concilj che il deteſtavano; perchè, non ſi volendo loro permettere nemmeno le mogli, non volevono abbandonare le concubine.

[i] Non vi era Veſcovo, nè prete, nè diacono, nè minimo chierico, che non aveſſe la propria concubina. Gian.

[k] Id.

The

The ſpirit and talents of Gregory the ſeventh were zealouſly engaged in purſuit of the ſame object[l]. He thundered forth his imprecations and anathemas againſt wives and concubines, which were anſwered by the clergy with execrations, ſarcaſms, and calumny[m]. They accuſed him of hereſy and innovation, of diſturbing the peace of the church, of necromancy, and of fornication and adultery, with the counteſs Matilda, the wife and widow of the duke of Lorrain. Tumults were excited in every part of Europe; but that fierce and inexorable pontiff was not to be deterred from his enterprizes by any oppoſition. Hildebrand. (Elected in 1073.)

Gregory's efforts were ſeconded, with more or leſs zeal, by ſucceeding Popes and councils. The puniſhment denounced againſt offenders was increaſed in proportion to their Progreſs of the Roman church.

[l] Moſheim, ii. p. 500.

[m] Amongſt other pieces of wit, the following *elegant* epigram was produced againſt this Pope:

Nudipes antiſtes, non curat clerus ubi ſtes,
Dum non incedis, ſtes ubicunque velis.

ſtubborn-

ſtubbornneſs, through the regular eccleſiaſtical gradations of ſuſpenſion, deprivation, and excommunication. Even they who knowingly heard maſs from prieſts who kept concubines were excluded from the communion of the faithful [i]. The council of Tours forbade them to leave any property by will to their baſtards or concubines; and if the canon was violated, the things bequeathed were confiſcated to the church [k]. As the power and cunning of the Roman pontiffs increaſed, whilſt that of other potentates ſeems to have equally diminiſhed, the prohibition was extended, and with additional force, from the clergy to the laity [l]. They are expreſsly mentioned as early as the council of Buda, in 1279 [m]. Many of theſe laws were the

[i] Decr. Nich. II. & Alex. II. Diſt. 32. c. 6. elected in 1059. 1061.

[k] A. D. 1239. cap. 7. Labbe, Concil. tom. xi. p. 567.

[l] Siccome creſceva l'accortezze e potenze ne' Pontefici Romani a pari della negligenza de' principi, ſi ſteſe anche la proibizione a' laici.—Giannone, cap. 14.

[m] Cap. 47. Ne laici publice teneant concubinas, &c. The puniſhment inflicted was the leſſer excommunication.

the decrees of national or provincial ſynods; but the ſubſtance of them was comprehended in thoſe of the œcumenical council of Baſil, held under Eugenius the fourth [m], which pronounces concubinage to be a mortal ſin, both in clergy and laity, whether married or ſingle; and the ſame regulations are repeated with little alteration in the general council of Lateran under Leo the tenth [n]. A regard for the purity of their manners was held out as the pretence in both caſes; but the real motives of the prohibition were ſomewhat different with reſpect to the clergy and the laity; the marriages of the latter were a fruitful ſource of revenue, whilſt the practice of concubinage could bring no emolument to the church; unleſs through her cenſures, and the penance which would be injoined offenders, if it were prohibited.

cation. Labbe xi. p. 1090. I cannot conceive what ſhould have induced Heineccius, El. Jur. German, § 309. to aſſert that concubinage was expreſsly allowed by the laws of the church, and no puniſhment decreed againſt it, till the ſixteenth century, and the council of Lateran.

[m] In 1434. Seſſ. 20. cap. 1. Lab. xii. p. 549.

[n] In 1514. Seſſ. 9. Lab. xiv. p. 227.

The

The canons againſt the concubinage of the clergy were equally ſevere with thoſe which prohibited their marriage, but they were not inforced with the ſame rigour, and indeed, from the ſcandalous univerſality of the practice, it muſt have been connived at by the court of Rome. To reſtrain them from all intercourſe with the female ſex was found by experience to be abſolutely impoſſible, more unjuſtifiable irregularities might be committed, and the tacit allowance of this leaſt criminal connexion might be conſidered as a reaſonable compromiſe. The intereſts of the church too were not ſo much concerned. The danger of weakening the attachment of the eccleſiaſtics to their ſpiritual mother, and of their affections being engroſſed by their carnal families, and worldly affairs, was leſs to be apprehended, where the union was ſlighter, the object, in condition of life and perſonal character, leſs worthy, and the children held in diſrepute by the civil laws, and in the public opinion.

After marriage was held to be a ſacrament, the concubinage of the laity aſſumed a new

form. No longer a mere mortal ſin, it was converted into a ſtill more odious crime. To keep a concubine was to deſpiſe the conjugal rites; this amounted to a contempt of holy church, by which they had been declared ſacred; now all contemners of the church were heretics, and therefore, by the ingenious logic of Rome, every concubinary incurred the guilt, and was ſubject to the puniſhment, of hereſy [o].

The Popes endeavoured to impoſe their regulations upon all the countries which were ſubject to their authority, but their ſucceſs was various. In Spain they were implicitly received; in Germany the decrees and prohibitions were ineffectual, and the pens and genius of the ſtouteſt theologians were in vain exerciſed from the time of

Succeſs in Spain. Germany.

[o] Council of Narbonne, under Julius III. 1551. Can. 64. Lab. xv. p. 30. In eos (concubinarios) tanquam in conjugalis ſacramenti contemptores, ob idque hæreſeos nomine ſuſpectos agatur. Et ubi in jus, inquiſitione in eos factâ, vocati fuerint, digno ſupplicio afficiantur.

Gregory

Gregory till the council of Trent in oppoſing the fervid demands [p] for matrimonial liberty, which were inſiſted upon by the divines of France. that country. France was diſobedient likewiſe to her ſpiritual father, till the time of Calixtus the ſecond, who, being of the royal family, had influence enough to deprive the French clergy of their wives, notwithſtanding their murmurs [q]. The oppoſition was ſtrong, the aid of the ſecular arm was called in, a compromiſe took place, and whilſt prieſts, deacons, and ſubdeacons were prohibited, the inferior orders were allowed to retain their wives. Their miſtreſſes were not much moleſted, it required longer time to extirpate them, both from amongſt the clergy and the laity; and Cujacius informs us, that a regular and legitimate concubinage was ſtill in uſe in his time in Gaſcony,

[p] Fervoroſe domande de' Germani. Id.

[q] Diſt. 27, c. 8. The wit of the clergy was equally alive upon this occaſion. A. D. 1119.

O bone Calixte, nunc omnis clerus odit te,
Olim preſbyteri poterant uxoribus uti,
Hoc deſtruxiſti tu quando Papa fuiſti;
Ergo tuum feſtum nunquam celebretur honeſtum.

and

and the Pyrennees[r]. The Swiſs not only retained this practice till the time of Zuinglius, but abſolutely obliged their pariſh prieſts, in many places, to keep concubines, for the ſecurity of their own wives and daughters[s]. In Italy it was found much eaſier to extirpate concubinage amongſt the laity than the clergy. The canons of the church were ſupported by the civil princes; and Charles the ſecond of Anjou inflicted the penalty of the forfeiture of a fourth part of their property upon concubines, who were excommunicated, and not reconciled within a twelvemonth. But the clergy had the boldneſs to aſſert, that their concubines were exempt from the ſecular juriſdiction, as a part of their family, and that princes had no authority to enact penal ſtatutes againſt them. This doctrine was maintained by ſome celebrated canoniſts; and when Robert, the ſon of Charles the ſecond, attempted, in 1317, to carry the law above mentioned into execution in the kingdom of Naples, the

Switzerland.

Italy.

[r] A. D. 1590.

[s] Sleidan. 1559.

clergy

clergy aroſe with ſuch fury that he was obliged to deſiſt[t]. The celibacy of the clergy was eſtabliſhed in England by the ſynod at Wincheſter, held in the year 1076, under the legate of Gregory the ſeventh; and, after his decrees were executed with greater ſeverity by the exertions of archbiſhop Anſelm, the eccleſiaſtics here were not behind thoſe of other nations in theſe irregularities, as our hiſtorians will fully demonſtrate[u].

England.

Final abolition.

In this manner concubinage maintained its ground throughout all Europe till the middle of the ſixteenth century; the laws of the church, by which it was condemned, were ſeldom, or but feebly, executed; and the gentle exhortations of the eccleſiaſtics

[t] Giannone.

[u] Hume, ii. p. 64. Our facetious countryman Walter de Mapes was greatly ſuperior to his foreign brethren in his well-known verſes upon this occaſion.—Priſciani regula penitus caſſatur, &c. &c. He ſeems rem acu tetigiſſe.

Reor eſſe melius, et magis decorum,
Quiſque ſuam habeat, et non proximorum.

were

were more than counterbalanced by their example. At that period, the revival of truth and ſcience diffuſed a purer morality; the effects of the reformation were not confined to the proteſtant aſſemblies; the church of Rome was ſchooled into a correction of its manners. Concubinage was prohibited with new ſeverity by the council of Trent [w], the canons began to be ſeriouſly inforced, the clergy amended their conduct, and from that time every connexion, ſhort of lawful matrimony, has been univerſally conſidered as a ſinful and uncreditable practice.

Hiſtory of baſtards from the ſame periods.

But though concubines were common in the middle ages, we are not to imagine that illegitimate children were upon the ſame footing with thoſe which were born in marriage.

Chaſtity of the German nations.

Baſtards deſpiſed.

If we may credit contemporary writers, an exemplary chaſtity was the peculiar virtue of moſt of thoſe barbarous nations, who

[w] Seſſ. 24. c. 8. 25. cap. 14. 11 Nov. 1563. The biſhops are directed to proceed ſine ſtrepitu et figurâ judicii, et ſolâ facti veritate inſpectâ.

were the anceſtors of modern Europe. The pure manners of the Germans have been immortalized by the enchanting pens of Cæſar and Tacitus, and a teſtimony equally honourable has been given to thoſe of the Saxons, the Goths, and the Vandals [x], who are even ſaid to have puniſhed incontinence with death. Hence it would neceſſarily follow that ſome degree of diſcredit would attach upon the iſſue of illicit amours, and they would probably be ſtigmatized by an excluſion from the inheritance of their parents, and other marks of diſgrace. For this reaſon the name of baſtard was always odious in Germany [y], and we find, in their reſpective codes of law, that the right of ſucceſſion was univerſally confined to legitimate children. I do not know whether we are to attribute the relaxation of this northern ſeverity amongſt the Lombards to the luxuri-

[x] Salvianus, quoted by Brotier in Tacit. Germ. 18. Eſſe inter Gothos non licet ſcortatorem Gothum, &c. Fornicatio apud illos crimen, &c. Heineccius. Elem. Jur. Germ. 146. n.

[y] Du Cange, voce Baſtardus.

ous

ous climate of Italy, or the contagion of Rome, but they form a ſingle exception, in beſtowing upon natural children a certain portion of their father's property in caſe of his inteſtacy [a].

Yet ſovereigns and nobles ſeem to have aſſumed a right of eſtabliſhing their baſtards upon a perfect equality with their lawful children [a]. The annals of almoſt every country, during the middle ages, will ſupply many examples of their ſucceeding to lordſhips and kingdoms, by the will of their father, by inteſtate ſucceſſion, or the choice of their ſubjects [b]; and ſo little was the illegitimacy of their birth conſidered as a blemiſh, that they did not bluſh to aſſume the name as a part of their deſcription; as in the well-known epiſtle of Wil- Sovereigns and nobles aſſumed privileges.

[a] LL. Longobard. Lib. 2. tit. 14. § 2.

[a] Du Cange, voce Baſtardus.

[b] Inſtances may be ſeen in the annals of the Viſigoths, Danes, and Normans, in Iſidor. Hiſp. Chron. Goth. ad 545. Adam. Brem. Hiſt. Ecc. L. 2. c. 54. Sturles, Hiſt. Norveg. p. 67. Heineccius.

liam the Conqueror to Alan Count of Britany [c].

Thoſe of ordinary rank.

Meantime the condition of baſtards of ordinary rank was very miſerable; they were not only incapable of hereditary ſucceſſion, but were conſidered as infamous; in ſome countries, they were incapable of being parties in a court of juſtice [d], or of diſpoſing of their property by will, and were even reduced to a ſtate of villenage [e]. The provincial council of Toledo in the ſeventh century decreed, that the natural children of the clergy, whatever their rank, ſhould be the perpetual ſlaves of the church to which they belonged [f].

Changes gradually took place in moſt of the countries of Europe, both in the

[c] Ego Willelmus cognomento Baſtardus. Du Cange 1. 202. [d] Du Cange. [e] Heineccius, L. 1. 149.

[f] The ninth council of Toledo, under Eugenius I. A. D. 655, cap. 10. Labbe, 6. p. 455. Proles in ſervitutem ejus eccleſiæ, de cujus ſacerdotis vel miniſtri ignominiâ nati ſunt, jure perenni manebunt.

condition

condition of noble baſtards, and of thoſe in the lower claſs. But ſince the records of France have been better preſerved than thoſe of moſt other nations, the beſt illuſtration of the laws and manners of the middle ages is to be found in the hiſtory of the Franks.

Hiſtory of baſtards in France. 1ſt Period. Two firſt races.

During the two firſt races of their monarchs little odium ſeems to have attached upon the name of baſtard, and the ſovereigns of that period made ſcarcely any diſtinction between their legitimate and their illegitimate offspring. Thus Thierry, or Theodoric, the natural ſon of Clovis the firſt, ſhared the kingdom with Clodomir, Childebert, and Clotaire, his legitimate brothers. Clovis the ſecond, the legitimate ſon of Dagobert the firſt, divided the kingdom with Sigebert, his baſtard brother; and, which is a ſtronger inſtance, Lewis and Carloman, the baſtards of Lewis the ſtammerer, were both crowned kings, to the excluſion of Charles the ſimple, their lawful brother [g].

[g] D'Agueſſeau, Diſſertation ſur les Bâtards. Oeuvres, tom. 7.

During the ſecond race indeed it ſhould ſeem that doubts began to be entertained whether they ſhould be admitted to the ſucceſſion to the crown. We may obſerve that Hugo and Drogo, the natural ſons of Charlemagne, were condemned to a monaſtic life, and excluded from any part of their father's inheritance. Carinthia only, of all his paternal dominions, was allotted to Arnulf, the natural ſon of Carloman, A. D. 880. Charles Le Gros endeavoured, but without ſucceſs, to eſtabliſh the ſucceſſion in Bernard, his ſon by a concubine. And though Arnulf, the emperor, after much conteſt with the inhabitants of Lotharingia, beſtowed that kingdom, in his life-time, upon Zuentebold his baſtard, the nobles ſubmitted with reluctance, and at length deprived him of his life and ſovereignty, A. D. 900 [h].

Theſe privileges, however, were peculiar to the higher ranks, amongſt whom the re-

[h] Heineccius. Elem. Jur. Germ. i. § 147.

cognition of the father had the effect of legitimation. All other baſtards were even reduced to the condition of ſerfs or villeins.

Both theſe points are fully proved by an anecdote related by Witikindus. Hermanfroy, king of Thuringia, had married Almeberge, the legitimate daughter of Clovis. When Thierry, the baſtard ſon of the ſame monarch, ſucceeded to the throne of France, and his title had been acknowledged by his ſubjects, he ſent an ambaſſador to his half-brother, to requeſt his recognition of his title. But Hermanfroy, refuſing his aſſent, expreſſed his aſtoniſhment, "that he who "was born a ſlave, ſhould think of aſpiring "to a throne before he had obtained his "liberty." He adverted to the general law, and refuſed Thierry the exemption which was uſually claimed by perſons of his rank[1].

[1] Lib. 1. D'Agueſſeau. Mirari non ſatis poſſe, quomodo uſurpare vellet prius imperium quam libertatem ſervus natus.

2d period —the 3d race.

With the third race a new era commenced. Hugh Capet iſſued an ordinance, by which baſtards were excluded from the ſucceſſion to the throne, and were no longer acknowledged as members of the royal family. He introduced likewiſe the bar, or baton, into their arms. The condition of other noble baſtards ſeems to have undergone the ſame change, and from this time they were excluded from their father's inheritances; but thoſe of the lower orders ſtill retained their ſervile ſituation. Amongſt other marks of villenage, they paid the uſual duties which were exacted of perſons in that condition; and they could diſpoſe by will of no more property than to the value of five ſols, without the conſent of the lord; nor could they marry a woman of a condition ſuperior to their own, without incurring a forfeiture of a third part of their goods. They were however allowed to be free born in ſome provinces where villenage was not in uſe, or was leſs rigorous [k].

[k] D'Agueſſeau.

The

The right of ſucceeding to baſtards, where they left no iſſue, was originally the perquiſite of the lords; but it was gradually encroached upon by the king, and at length entirely reunited to his domain. This uſurpation, and the eſtabliſhment of the maxim, that the Lords Haut Juſticiers do not ſucceed, unleſs where the baſtard is born, domicilled, and dies within their ſeignory, ſeems not to have been fully completed till the reign of Francis the firſt. And from an ordinance of that monarch in 1534, by which he grants permiſſion to ſoldiers and archers, even if they are baſtards, or ſtrangers, and had no letters of legitimation or naturalization, to make a will, or tranſmit their property to their relations, it appears that they were ſtill in ſome meaſure in a ſtate of ſervitude [1].

3d or modern period. Reign of Francis I.

Yet the commencement of a third, or the modern period in the hiſtory of this ſubject, may be fixed in the latter end of that reign. It is clear that from that time, by the general

[1] D'Agueſſeau.

laws

laws of the kingdom, and the cuſtomary codes of moſt provinces, they were conſidered as entirely free, and exempt from any marks of villenage; they became capable of making wills; and the only diſtinction between them and legitimate perſons, as to the rights of property, conſiſted in the rules of inheritance in caſe of inteſtacy[m].

Amongſt the many real, and pretended evils of the French monarchy, none called for a more radical correction, than the incredible multiplicity and variety of laws in which their juriſprudence was intangled. Beſides the general laws and ordonnances which extended to the whole kingdom, every province, nay almoſt every diſtrict and baillage, had its ſeparate code of cuſtomary regulations.

Upon the ſubject of which we are now treating, their diſpoſitions were infinitely various; but in the midſt of this confuſion,

[m] D'Agueſſeau.

we

we may clearly perceive, that in the countries of the Droit Ecrit, the influence of the civil law, ever favourable to concubinage, had extended to the iſſue, in different degrees, the privilege of maternal ſucceſſion; whilſt, in the other parts of the kingdom, the operation of the other cauſes I have before ſtated, had annihilated all connexion with their anceſtors. But many of the modern laws relating to baſtards, before the deſtruction of the monarchy in France, were deduced from this their original and moſt uſual ſituation, and even their incapacity to diſpoſe of their property by will, though without any other trace of villenage, ſtill continued in ſome diſtricts, as the Bourbonnois and Bretagne. Some effects of the former privileges of the illegitimate children of great men ſtill ſubſiſted. The cuſtoms of Artois expreſsly declare the nobility of the illegitimate ſons of noblemen. The French lawyers have decided the ſame point in general, with only this reſtriction, that the ſon deſcended one ſtep in the gradation of honor below his father; that the baſtards of kings

kings are, or rather were, princes; of princes, lords; of lords, gentlemen; whilſt the unfortunate offspring of ſimple eſquires degenerated into the humble condition of plebeians [q].

III. The compariſon.

We have now traced the ſubject before us through the regulations of the moſt celebrated nations of antiquity, and have, in ſome meaſure, deduced the hiſtory to our own times. In the looſe ſtate of ſociety, before laws and manners had acquired a definite and conſiſtent form, we find little to attract our attention, and ſtill leſs which can be applied to any practical utility. It may be a curious queſtion how far the operation of climate, and other local cauſes, may ſo far affect the habits of men, as to occaſion the very eſſential differences, which have ever exiſted between the laws of the Eaſt and thoſe of the Weſt, upon this ſubject; but a legiſlation, however high its authority, which was calculated only for a choſen people, for certain wiſe, but peculiar,

[q] D'Agueſſeau.

ends,

ends, can ſeldom ſupply models of law or policy, upon general principles, to nations whoſe ſituation and objects are totally different. The hiſtory of Athens is the beſt commentary upon thoſe narrow maxims, which excluded from the rights of legitimacy and of citizenſhip a large portion of inhabitants, who nevertheleſs might have contributed their full ſhare to the wealth and proſperity of the country. The caſual regulations of barbarians would ſcarcely have deſerved notice, if we did not diſcover in them the origin and foundation of laws and cuſtoms ſtill ſubſiſting. But the legal ſyſtem of the Romans demanded, and has afforded, a picture more diſtinct, and upon a larger ſcale.

Upon comparing thoſe laws with the principles before laid down, it will have been ſeen, that whilſt, to promote an inſtitution, of whoſe policy they were fully ſenſible, they ſeem to have violated the principles of juſtice and of humanity, by inflicting penalties upon celibacy of too ſevere a nature, and

and which infringe too much upon the common rights of mankind, and by depriving the unhappy offspring, in many caſes, of a part of what the benevolence of their parents might beſtow upon them, and, in others, by leaving them quite deſtitute of a proviſion; ſo, on the other hand, they ſeem to have more than counterbalanced theſe proviſions, by laying too many reſtraints upon marriages, by the abſurdity of allowing their validity, though contracted in defiance of thoſe prohibitions, and, above all, by permitting concubines, by admitting baſtards to every privilege on the part of their mothers, and by the power of legitimation.

It is unneceſſary to collect here the various learning, which might be drawn together from the books of authority upon the laws of England. The principles which ariſe from them are few and ſimple. The compariſon with other laws will be beſt made by conſulting the correſponding heads in the abridgements and digeſts. Upon the whole

whole view, it will appear, that upon this important and delicate ſubject, the laws of this country have diſcovered the happy medium, and have ſteered clear of thoſe extremes, of too great relaxation, and unjuſtifiable ſtrictneſs, into which many other nations have fallen. That marriage is favoured in the only points which ſeem peculiarly to bear upon it, and that, truſting to natural inſtinct, and not having to encounter the formidable prejudices which have diſtorted the legiſlation of other countries, they have left every man at liberty to form, or not to form, the nuptial connexion. That agreeably to ſound maxims of policy, they diſcourage equally every connection between the ſexes, except that of lawful matrimony; and have juſtly refuſed to diſtinguiſh from the reſt the ambiguous ſtate of concubinage. That they have defined, by an unerring rule, what perſons ſhall be conſidered as illegitimate, and have not held out an encouragement to illicit love by admitting legitimation. That ſince the right of inheritance is the mere creature of the laws, they

they have properly refuſed that benefit to the iſſue of a connexion of which they diſapprove; but they have laid thoſe unfortunate perſons under no other incapacities reſpecting property; and, whilſt they deny the parents any civil authority in that character, they allow the relation ſo far as to prevent inceſtuous marriages, and to compel the natural and mutual duties of maintenance.

To what are we to attribute this excellence of the Britiſh laws above thoſe of ſome of the wiſeſt nations in the world? It is ſolely owing, under the bleſſing of Providence, to the reciprocal action and reaction of good laws, and good morals. Where a people, conſpicuous for their virtue, are their own legiſlators, the laws will naturally partake of the national character, which, in return, they will contribute to form and improve. The Britiſh is perhaps the only country, under an equal degree of wealth, commerce, ſcience, and refinement, where integrity of principle forms an operative part of the national character, and uniformly influences

ences the conduct of individuals, as a permanent and general motive to action. Of minds ſo conſtituted foreigners can ſcarcely form an idea. When a Frenchman, for inſtance, firſt arrives in this country, he conſiders that appearance of virtue which cannot but ſoon engage his obſervation, as grimace, or an affectation of honeſty for the purpoſes of deceit. When upon a nearer view he finds it to be real, his aſtoniſhment is only to be equalled by his contempt. Not aware that "virtue and integrity are the "ſtanding policy of individuals, as juſtice "is of ſtates," not diſtinguiſhing cunning from wiſdom, they are ever ready to deſpiſe what they cannot comprehend, and to attribute the excellence of our laws and conſtitution, and the happineſs of the people, which even envy cannot deny, to any cauſe rather than the true one.

If it be aſked ſtill farther from whence ariſes this boaſted ſuperiority in virtue in the Britiſh character? An adequate cauſe may be eaſily aſſigned,—in the pure and exquiſite

ſpect to the unhappy offspring of ſuch illegal connexions, ſo different from what prevailed in the days of pagan ſuperſtition, and when a religion the ſame, in name and outward form, with our own, but far different in ſpirit and effect, was avowed as the guide of the firſt Chriſtian legiſlators.

May thoſe laws and that ſound form of religion, which is their only ſolid baſis, ever maintain their ground in this highly-favoured iſle; unſhaken in their foundation, by any falſe principles, under whatever ſpecious names they may be introduced; and not weakened in their effects, by the inattention of thoſe, whoſe duty, as well as intereſt, it is to ſupport them both by their countenance and example!

# THE CASE

OF

# *HORNER*

AGAINST

## *LIDDIARD, otherwiſe WHITELOCK, falſely calling herſelf HORNER.*

---

*HARRIET LIDDIARD*, otherwiſe *Whitelock*, was the natural daughter of *Sarah Liddiard*, by *John Whitelock Eſquire*, and was born on the 12th day of September 1777. Mr. *Whitelock* died in the year 1788, and by his laſt will, bearing date the 30th of April 1787, in which he appointed *Sarah Liddiard*, and *George Aſhley*, ſince deceaſed, his executors, he acknowledged *Harriet Liddiard*, otherwiſe *Whitelock*, as his natural child; and bequeathed certain parts of his perſonal property to his executors upon truſt, to put the ſame out at intereſt, until *Harriet Whitelock* ſhould attain the age of twenty-one years, or be married, with the

conſent and approbation of the ſaid *Sarah Liddiard* and *George Aſhley*, or the Survivor of them; the intereſt, meantime, to be laid out in her board, maintenance, clothes, and education; and to pay her the whole, when ſhe ſhould ſo attain the age of twenty-one years, or be married with ſuch conſent; and it was his will and deſire, that all poſſible care ſhould be taken of the ſaid *Harriet Whitelock*; and he gave the tuition and care of her to *Sarah Liddiard* and *George Aſhley* during her minority.

On the 7th day of March 1796, a marriage was ſolemnized between *Thomas Strangeways Horner Eſquire* and the ſaid *Harriet Liddiard*, otherwiſe *Whitelock*, ſpinſter, by virtue of a licence, under ſeal of the conſiſtory court of the *Lord Archbiſhop of Canterbury*; wherein *Harriet Liddiard*, otherwiſe *Whitelock*, is deſcribed as a minor; and wherein it is ſtated, that the marriage was ſolemnized by and with the conſent of *Sarah Liddiard*, there ſtiled *Sarah Whitelock*, widow, her mother, and guardian; and which conſent was in fact obtained.

In

In February 1799, a ſuit was inſtituted by Mr. *Horner*, in the conſiſtorial court of *London*, againſt *Harriet Liddiard*, otherwiſe *Whitelock*, falſely calling herſelf *Horner*, ſpinſter, and pretending to be the wife of the ſaid *Thomas Strangeways Horner*, to obtain a ſentence, pronouncing and declaring the ſaid marriage to have been null and void, purſuant to the act of the *26th year of King George the ſecond*, chapter the 33d, uſually called *the marriage act*, which enacts, in ſection the 11th, "that all marriages, ſolem-"nized by licence, where either of the "parties, not being a widower or widow, "ſhall be under the age of twenty-one years, "which ſhall be had without the conſent of "the father of ſuch of the parties, ſo under "age, (if then living), firſt had and obtained, "or if dead, of the guardian, or guardians, "of the perſon of the party ſo under age, "lawfully appointed, or one of them; and "in caſe there ſhall be no ſuch guardian, or "guardians, then of the mother (if living "and unmarried), or if there ſhall be no

" mother living and unmarried, then of a " guardian or guardians of the perſon ap- " pointed by the court of chancery; ſhall be " abſolutely *null and void* to all intents and " purpoſes whatſoever."

After the uſual proceedings, the cauſe came on for hearing, upon the 4th ſeſſion of Eaſter term, the 8th of May 1799, and was finally decided upon the firſt ſeſſion of Trinity term, the 24th of May following.

At the hearing, on the part of Mr. Horner, it was maintained by *the King's Advocate* and *Dr. Swabey*, that ſome conſent is neceſſary to the marriage of minors; and the queſtion is, who are competent by the act to give that conſent. That illegitimate fathers and mothers are not within that part of the ſtatute of the 26th *Geo.* II. c. 33. ſ. 11., which requires the conſent of parents to the marriage of their children under age, and that therefore no perſon can give a valid conſent, in the caſe of illegitimate

mate minors, but a guardian appointed by the *Court of Chancery*, under the laſt clauſe of that ſection of the act.

A baſtard, it was argued, is ſaid by our laws to be *nullius filius*; illegitimate parentage conſtitutes no civil character, and there is no inſtance in which natural conſanguinity is conſidered in matters of mere poſitive inſtitution.

The moral relation is not denied. It has its effect in prohibiting inceſtuous marriages between perſons ſo connected. A man cannot marry his natural ſiſter. But it does not extend itſelf to conſequences merely civil.

It is a perfect nullity with reſpect to inheritances both real and perſonal. They fall to the crown rather than natural children ſhould ſucceed to them.

It has been decided, that a natural father cannot appoint a guardian to his children. In ſuch caſes it is the uſual practice for the

*Court*

*Court of Chancery*, by its own authority, to appoint the ſame perſon who has been nominated by the parent. This was done in the caſe of *Harford againſt Morris*.

Before the ſtatute of the 18th *Eliz.* he was not bound to maintain them.

There is no inſtance in which the words "*father* or *mother*," ſimply uſed in any ſtatute, are applied to any other than legitimate parents.

In 2 *Bulſtrode* 394. in the act of 43 *Eliz. c.* 2. *ſ.* 7. the words father and grandfather have been held not to extend to illegitimate fathers and grandfathers.

In thoſe ſtatutes which expreſsly relate to them, the qualifications of putative, or reputed, are added.

The conſent of parents to marriage being of mere poſitive inſtitution, not a moral, but a civil, act, the terms muſt have the ſame

ſame interpretration here as in other ſtatutes. The word father muſt be referred to the general phraſeology of the law.

A different rule would lead to great difficulties and abſurdities. How was the father to be aſcertained? There are no means of doing it legally; different perſons might claim. If the mother was dead, who could decide the diſpute?

If the father was dead, the illegitimate mother would have a greater authority than a lawful mother. Becauſe the father could not appoint a guardian to diſplace her.

If the rule of partus ſequitur ventrem were to be adopted, the mother would be preferred to the father.

It appears to mean the legitimate father by the order in which it is arranged. After father, the act mentions, the guardian lawfully appointed; an illegitimate father cannot appoint.

This

This interpretation is univerſally adopted in practice. If illegitimate parents ſhould attempt to forbid the banns, they cannot ſtand up in the church to acknowledge an offence for which they are liable to puniſhment.

No ſuit is ever brought here by the illegitimate father for nullity of marriage; yet the legitimate father is conſidered as having ſuch an intereſt in his child as entitles him to inſtitute a ſuit for that purpoſe in his own right.

In granting licences the conſent of the natural father is never required. The *Court of Chancery*, in ſuch caſes, appoints guardians to conſent. The affidavit, upon which licences are obtained, mentions only the lawful father, and theſe forms were ſettled by the authority of perſons high in the profeſſion.

It is ſaid, that there are caſes in the temporal courts which have adopted a different con-

conſtruction; but, if they are examined, it will be found that they do not warrant that concluſion.

In that of the *King againſt Edmonton*, 2 *Bott* 85. Mr. *Juſtice Buller* obſerved, "that "it was not neceſſary, in that caſe, to give "a deciſive opinion upon the conſtruction "of the marriage act." Mr. *Juſtice Wills*, who thought otherwiſe, ſays, "as to the "conſtruction of the marriage act, it ought "in this caſe to be liberal. We are war- "ranted in conſidering a putative father as "within it, by the caſe of the *King* v. *Corn-* "*forth*, *Bott* 405. where the expreſſion in "the ſtatute of *Philip* and *Mary* is ſimilar "to that in the marriage act." So Mr. *Juſtice Aſhhurſt*. "The caſe of the *King* v. "*Cornforth* is ſtronger than the preſent, and "authorizes us to put that conſtruction on "the marriage act."

This judgement therefore ſtands upon that in the former caſe; but if it is attended to, it will not ſupport that conſtruction.

It

It was a motion for an information, upon the ſtatute of the *4th & 5th of Philip and Mary, c.* 8. for taking away and marrying a natural daughter of one *Bobun,* who was but fifteen years old. The information was granted upon the third ſection, which forbids taking away any woman child from the poſſeſſion, not only of the father or mother, but of any perſon who ſhall happen to have, by any lawful ways or means, the order, keeping, education, or government, of ſuch child, ſuch as ſchoolmaſters, and ſo forth. It is clear the information was granted, not upon the ſecond ſection, which relates to parents only, but upon the third ſection. *Chief Juſtice Lee* ſays, "It is not ne-"ceſſary for the court in this caſe to give "any judgement upon the fact, whether "legitimate or not, neither is that the point "in the act, but the taking her from the "poſſeſſion of a perſon having, by lawful "means, the poſſeſſion of her."—*Chapple J.* "If it had reſted ſingly on the ſecond ſec-"tion, I ſhould have had ſome difficulty; "but it is plain from the ſecond and third

"taken

" taken together, that they intended to take " in different caſes, ſo that they are quite " diſtinct, and whether legitimate or not, " makes no difference on the third." So *Juſtice Wright.*

It is ſubmitted, therefore, that there is no caſe in which the temporal courts have decided contrary to the judgement of this court, in the caſe of *Foſter* v. *Lawrence*; but if they had, the queſtion of the validity of marriages is of the peculiar and excluſive juriſdiction of the eccleſiaſtical courts.

But the authorities are all on their ſide of the queſtion—*Blackſtone's Commentaries*—the practice of the *Eccleſiaſtical Offices*, which is material to ſhew the opinion of theſe courts at the time. If it were otherwiſe, the *Court of Chancery* could not appoint a guardian till the mother was dead. If it is eſtabliſhed, that the mother's is a competent conſent, every marriage had under a guardianſhip appointed by chancery, whilſt the mother was living, would be null.

On

On the other ſide, *Dr. Arnold* and *Dr. Lawrence*, in ſupport of the marriage.

The marriage act requires the conſent, firſt of the father, next of a guardian by him appointed; thirdly, of the mother. In this caſe there are no perſons anſwering to either of the two former deſcriptions. There was however a mother, and her conſent was obtained in the moſt formal manner.

The objection is, that ſhe is not a perſon who is competent to conſent; and the queſtion is, whether the terms father and mother in the ſtatute, which are uſed without any words to limit their meaning, extend to illegitimate, as well as to legitimate, parents.

It is ſaid, that in other ſtatutes, eſpecially thoſe relating to the poor, the terms are reſtrained to the lawful father and mother. But thoſe ſtatutes reſpect only matters of property or police, which are of poſitive inſtitution and municipal regulation. In laws relating to ſuch points, the names of con-

conſanguinity will include only ſuch relationſhip as is contracted according to the regulations of the country. But marriage is not of poſitive inſtitution, and, with reſpect to it, relationſhip is always conſidered as it exiſts by nature, and connexions are forbidden between thoſe related by blood and nature, as well as thoſe who are ſo likewiſe by law. The terms uſed in any law are to be interpreted in the ſame ſenſe in which they are uſed, on other occaſions, on the ſame ſubject. In a ſtatute therefore relating to marriage, the terms of conſanguinity muſt include natural as well as legal relations.

Illegitimate minors are equally within the policy and intention of the act. They are as much in want of the care and protection of their parents, as other children.

It has been decided that they are within the proviſions of the ſtatute, and that conſent is neceſſary for their marriage. In the caſe of the *King againſt the inhabitants of*

*Hodnett, T. R. vol.* 1. *p.* 96. Mr. *Juſtice Buller* ſays, " The words of the marriage " act are very general. It ſpeaks of all per- " ſons, except under particular circum- " ſtances. Then do illegitimate parents " come within any of theſe exceptions? If " they do not, they fall under the general " regulations eſtabliſhed by the act."

If this point had been determined in the caſe of *Foſter and Lawrence*, I would not have argued it. But I underſtand, from the court itſelf, that it was not decided. The judgement went on another ground—that there was no conſent whatever.

This point has been expreſsly decided in the caſe of the *King againſt the Inhabitants of Edmonton*, a ſettlement caſe, in which the whole cauſe depended upon it.

*The King againſt Cornforth* ſhews, that the natural father has the lawful cuſtody of his children.

The

The opinion of the court of *King's Bench* in theſe caſes is entitled to the greateſt attention. For though theſe courts have the ſole cognizance of the validity of marriages, yet it is generally held, that if ſtatutes are made upon ſuch points of excluſive juriſdiction, the courts of common law have a right of iſſuing a prohibition if this court varies from them in the interpretation of them.

An illegitimate parent muſt be preſumed at leaſt to pay more regard to the intereſts of the child than a mere ſtranger, to whom the power of conſent muſt otherwiſe be given by appointment of the Court of Chancery.

It is ſaid to be the practice of the *Court of Chancery* to appoint guardians in ſuch caſes. They uſually are appointed on application *ex parte*, and no caſe is mentioned in which the circumſtances have been brought to the notice of the court.

It is ſaid likewiſe to be the practice of the *Eccleſiaſtical Courts*, not to require the con-

ſent of an illegal parent, on granting licences.—Theſe paſs on the application and repreſentation of the party, and no inſtance is mentioned, in which the circumſtances were brought to the notice of the judge of any of theſe courts.

The mother here was appointed guardian by the will of the father, he expreſsly authorized her to conſent, and a conſiderable part of the girl's fortune was made to depend upon that conſent.—An illegitimate father indeed, ſtrictly ſpeaking, cannot appoint a guardian; but the *Court of Chancery* will always accept ſuch nomination. 2 *Brown.* 583. *Ward* v. *St. Paul.*

## SIR WILLIAM SCOTT.

This is a proceeding by *Thomas Strangeways Horner Eſquire* againſt *Harriet Liddiard*, otherwiſe *Whitelock*, deſcribed as ſpinſter, to obtain a ſentence of nullity of marriage by reaſon of minority; the party againſt whom the

the proceedings are had, being illegitimate, a minor, and having been married by licence, with no other conſent than that of her natural mother.

The facts undertaken to be proved are—*firſt*, the date of the birth of the party—*ſecondly*, the illegitimacy of the birth—*thirdly*, the date of the marriage—*fourthly*, that the marriage was had by licence (not by banns), and on the conſent of the mother only—and, *fifthly*, that no guardian had been appointed previous thereto—from whence it is inferred that the marriage is null and void, as not being ſupported by a legal and effectual conſent.

It has been admitted, that the facts, from which this legal concluſion is to be deduced, are ſufficiently eſtabliſhed. The date of the birth, and the illegitimacy, are proved by the natural mother. They are proved likewiſe by *Anne Aſhley*, who was preſent at the birth of *Harriet Liddiard*, otherwiſe *Whitelock*, and afterwards at her baptiſm; and

by another perſon of the name of *Charlotte Mildenham*, who is the natural ſiſter of the party. There is alſo an entry of baptiſm, upon the 12th of November 1777, in which ſhe is deſcribed as being baſe-born. The *third* and *fourth* facts, namely, the date of the marriage, and that it was a marriage by licence, (with the conſent of the natural mother only), are proved by the mother herſelf, and by *Robert Walker*; and it appears to have been ſolemnized upon the ſeventh of March 1796. Theſe facts are proved likewiſe by the affidavit to obtain the licence, and by the entry of the marriage. The *fifth* fact, which is undertaken to be proved, that there was no appointment of a guardian, is eſtabliſhed by *Mr. Stevenſon*, who is a ſolicitor in the Court of Chancery, and *Aaron Collingbourn*, who have ſearched the records of the Court of Chancery from Hilary Term 1777 to Trinity Term 1796, in which period no appointment of a guardian occurs, and if it exiſted at all, it muſt have been found amongſt theſe records.

The

The facts, therefore, upon which the parties rely, are fully eſtabliſhed, and the only queſtion is, whether the concluſion of law is rightly deduced.

That queſtion ariſes upon the *act of parliament*, which has made certain other conſents neceſſary, beſides the conſents of the contracting parties themſelves. Theſe additional conſents are thoſe of the parents, or guardians, according to the different circumſtances of the caſe.—*Firſt*, the conſent of the father.—*Secondly*, of the guardian, appointed by the father.—*Thirdly*, if the father is dead, and no guardian is appointed by him, the conſent is in the ſurviving parent, if ſhe is unmarried.—And, *laſtly*, the conſent of a guardian appointed by the Court of Chancery.

So far as the conſent of parents or guardians is abſolutely required, the act of parliament has introduced a new rule. The conſent of parents was not required *de neceſſitate* to the marriage contract, in its own

nature, as underſtood by the law of this country, or by its religion, which mixed itſelf much in the conſideration of this ſubject. It was indeed a conſent highly deſirable to be procured, from motives of piety, and filial reverence, from motives of prudence, and of family convenience and propriety; but the obtaining it was a duty though of high, yet of imperfect obligation only. The want of ſuch conſent was, as the eccleſiaſtical lawyers expreſſed it, an *impedimentum impeditivum*, an impediment which threw an obſtruction in the way of the celebration of the marriage, but not an *impedimentum dirimens*, an impediment which at all affected the validity of the marriage, if it was once ſolemnized. As to the conſent of guardians, it does not appear to have been much thought of, except in certain feudal relations, where the power of guardians was carried to a very extravagant length, and for purpoſes pointing almoſt entirely to the intereſt of the guardians themſelves.

The marriage act extends its regulations to the marriages by licence of all perſons whatever, with the exception of a few caſes, amongſt which the caſe of baſtards is not included; at leaſt, not nominatim. They are therefore neceſſarily included under the regulations of the act, unleſs they are out of the reaſon and policy upon which it is founded. But they are clearly within the reaſon and policy of that act; illegitimate minors may have property which requires to be defended; in all caſes they have their perſons and their perſonal happineſs in life; and it is fit that their perſonal happineſs ſhould be protected by experience and prudence greater than their own.

Accordingly the *Court of King's Bench* has decided in the caſe of the *King againſt the Inhabitants of Hodnett*, that illegitimate children fall under the general regulations eſtabliſhed by the act. The opinion of the Eccleſiaſtical Court was expreſſed in the caſe of *Foſter and Lawrence*, and the marriage was declared void upon one, or both, of theſe grounds,

grounds, either that the additional conſent was not given, or, if it was, that it was not the proper additional conſent. It is ſo conſidered likewiſe by the Court of Chancery, in the appointment of guardians to conſent to the marriages of baſtards.

The neceſſity therefore of an additional conſent is univerſally recognized by all the courts in the kingdom. The only queſtion is, what is the proper additional conſent in the caſe of ſuch perſons? Now it appears to me, that the *Court of Chancery* has anſwered that queſtion ever ſince the paſſing of the act, by its uniformly appointing guardians to baſtards, although the father and mother were living. This univerſal practice certainly expreſſes the opinion of that court, not only that baſtards are within the act, but that the reputed parents cannot give the conſent required; for, if they could give that conſent, the *Court of Chancery* would only have appointed a guardian, when the father had died without nominating a guardian, and when the mother was dead, or married again.

again. But it is not ſo. The court therefore conſiders theſe perſons as included in the act, but that it has placed them under the laſt deſcription only, of thoſe who have neither father, nor guardian lawfully appointed, nor mother. It applies the firſt regulations only to legitimate children, as they only can have a father, a mother, or a teſtamentary guardian. And the Court of Chancery has conſtantly, as I have underſtood, acted upon this conſtruction.

The *Eccleſiaſtical Court* has followed the *Court of Chancery* in adopting that conſtruction; and it has always refuſed to grant licences upon the mere conſent of the natural father or mother, and unleſs it is ſtated that they are the lawful father or mother. I have always underſtood that the form of the affidavit, upon which licences are now granted, was originally ſettled, at the time of paſſing the act, upon great adviſement and conſideration, by eminent lawyers of both profeſſions.

In

In the caſe of illegitimate minors, during the lives of their parents, the conſtant courſe has been for guardians to be appointed by the *Court of Chancery*, whoſe conſent has been ſuppoſed to render their marriage valid. Many marriages exiſt in this country, which have taken place in this manner, and they are all void, if this is not the true conſtruction of the act; becauſe they have been had without that conſent of the parents, which the act otherwiſe would make neceſſary to ſuſtain their validity.

If it is argued that this is an improper conſtruction, the objections (independent of all authority upon the ſubject) muſt ariſe, either, in the *firſt* place, from general principles, ſhewing that another conſtruction is neceſſary or expedient to be adopted; or, *ſecondly*, from the context of the act itſelf; or, *thirdly*, from a different conſtruction of the ſame expreſſions in other ſtatutes in *pari materiâ*.

In

In the *firſt* place, I preſume that it is to be admitted, that the father and mother intended by the act, are to be the father and mother *ejuſdem generis*, they muſt be both parents of the ſame deſcription; not a legal father and an illegal mother. Now, on all general principles, it is perfectly clear, that the only father, whom the law of the country has armed with the *patria poteſtis*, is the father *Quem Nuptiæ demonſtrant*. He only is the guardian of his child by law, and he may delegate that truſt to another at his death.

The only caſes in which the natural parent is acknowledged, are caſes to his diſadvantage, in caſes of civil concern, or by way of reſtriction, in ſuch as are of a moral nature.

He is compelled by latter ſtatutes to maintain the child, for the relief of the pariſh, to eaſe it of the charge to which it is primarily liable, becauſe before theſe ſtatutes the pariſh alone was bound to maintain it. It is laid

laid down in *2d Bulſtrode* 349. and *Bott* 116. that before the ſtatute of the *13th Eliz.* the pariſh where the child was born muſt maintain it till it gained a ſettlement. The cuſtody of the child therefore muſt have been at that time in the hands of the pariſh, he was filius populi, and there was no ground upon which the poſſeſſion of the child could have been aſſumed by the father. Even ſince the enactment of that ſtatute, for a conſiderable time it continued a matter of no inconſiderable doubt, whether the parent had a right to take the child out of the poſſeſſion of the pariſh. In the caſe of *Newland againſt Oſman*, *Bott* 116. there was the opinion of three judges of the court, that the father, under ſuch circumſtances, agreeing to maintain the child, had a right to the poſſeſſion, and they referred to Saunders's Reports. But I find that Mr. *Juſtice Foſter* ſays, "I am "not ſo clear in theſe points. I think the "caſe of educating baſtard children is not "to be conſidered as a burden to the pariſh "but as a truſt; and that it ſhould not be "eaſy for fathers to take them out of their "care

"care and cuſtody; the ſtatute is expreſs, "that the juſtices ſhall order the father to "contribute to the pariſh for the mainte- "nance of the child. Though it is not to "be ſuppoſed that fathers will deſtroy their "baſtard children, yet they may look upon "them as a burden and a ſhame, and there- "fore either neglect them, or put them in "improper hands. The reſolutions and or- "ders of juſtices of the peace have been "grounded upon this, not for requiring ſe- "curity till the child come to a certain age, "but becauſe the order intended the age "too far; therefore I am not ſo clear. The "caſe in Saunders was only his own opi- "nion."——Certainly if ſo eminent a perſon expreſſed himſelf in ſuch a way, it is enough to warrant a concluſion that it continued to be a matter of ſome doubt, long after the paſſing of that ſtatute, whether the natural father had a right to the cuſtody and poſſeſſion of his child againſt the pariſh.

Though this may now be ſettled, ſtill he can appoint no guardian; and, I preſume, that

that he cannot legally take the child out of the cuſtody of the mother, in which it is depoſited by nature at its birth; though I ſpeak with all neceſſary caution on a point belonging to the learning of another profeſſion.

All this is ſufficient to ſhew that he has the principal burden of maintenance, with a very ſmall degree (if any) of parental authority.

According to the general policy of the law in matters merely moral, he is ſaid to be reſtrained from marriage with illegimate relations as much as with legitimate ones; becauſe the rules of prohibition of marriage ariſe out of natural relations; and though theſe rules (as received by our law) are perhaps carried further than might ſeem neceſſary, on mere moral and natural grounds, ſo far as they can be exactly aſcertained by mere reaſon, yet, as they are taken from the law of God, and have one common origin therein, they are all conſidered as of the ſame moral

moral nature and obligation. It is however to be obſerved, that even this matter does not appear to have yet received a final deciſion; becauſe I ſee that in the caſe of *Haynes againſt Jephcott*, the cauſe was adjourned, and therefore no deciſion was given upon the queſtion; although undoubtedly the eccleſiaſtical court, the proper forum on queſtions of that nature, conceived that marriage came within the reach of the prohibition.

But, taking it to be ſufficiently ſettled (as I conceive it is), that moral reſtraints do attach upon natural conſanguinity, yet certainly it is not to be aſſerted, that the abſolute neceſſity of parental conſent to the validity of the marriage contract is conſidered, in law, as of more than of poſitive and civil inſtitution. Nothing belongs to the validity of that contract naturally, (as far as it has uſually been conſidered and treated by moſt human laws), but the conſent of the parties themſelves, if they are of an age capable of executing the duties of that con-

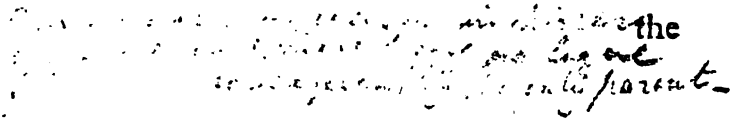
tract. I desire to be understood as advancing nothing upon the question whether human laws have considered this matter rightly: I only assert the fact, that they have so considered it. For nothing can be more clear than that, by the universal matrimonial law of Europe before the reformation, the consent of parents was not required *de necessitate* to the validity of the contract. Upon this footing, the matter continues in every country of Europe holding communion with the church of Rome, except where regulations merely civil have in later times introduced a novel and peculiar law upon the subject. Upon this footing the matter remained in many protestant states after the reformation; it so remained amongst ourselves till the time of the marriage act; and nothing can more clearly shew than that very act, how much human law is in the habit of considering the interposition of the parent's consent as of civil institution only. The power is given to one parent exclusively; upon his death it does not survive to the other parent, but it is given preferably

to any ſtranger whom the deceaſed parent has thought fit to nominate, and it devolves to the ſurviving parent only in defect of ſuch nomination. If it does ſo devolve to her, it continues with her only during widowhood; for her ſecond marriage, though it does not at all affect her natural character of parent, puts an entire end to her legal right of conſent to the marriage of her child, and transfers it to the publick magiſtrate. Nothing can more ſatisfactorily prove how much the matter has been treated and moulded as under the entire dominion of mere civil prudence.——As to the neceſſity of the conſent of any guardian, it is ſufficient to obſerve, that the office itſelf is a mere creature of civil inſtitution.

So much then as to the general analogies of the law with reſpect to the rights it has veſted in parents, and the capacity which it has given to children.

Let us next look at the context of the act to ſee what is to be deduced from thence.

*Firſt*, The marriage of minors is to be had with the conſent of the father. Of what father? I take it clearly to mean of the legitimate father and him only; for it follows, *ſecondly*, the conſent of a guardian lawfully appointed. But how appointed? I preſume by the father, under the act of parliament, which gives him that power. For there are only two modes of appointment known to the laws of this country; by the father, under the ſtatute, and by the *Lord Chancellor*. Now the guardian appointed by the *Court of Chancery* is not introduced till a later ſtage, where he is particularly deſcribed. Conſequently the guardian, here ſpoken of, muſt be the guardian appointed by the father; and the father, who is mentioned, muſt be he who can appoint a guardian; but it is admitted that that power belongs only to the lawful father. The father therefore ſpoken of before, muſt be that father, and that father only. In the third place, the conſent of the mother. If the natural mother is to be underſtood, ſhe would have more authority than a legal mother, becauſe



the right of giving conſent does not devolve upon the legal mother till in the third inſtance, viz. in caſe of a defect of appointment of a guardian by the father. But the natural mother would be entitled to give a valid conſent in the ſecond inſtance, as the natural father can appoint no guardian.

If the illegimate father is to be conſidered as capable of giving a valid conſent, is it every illegitimate father? certainly not; becauſe in many caſes no ſatisfactory evidence can be given of paternity. What evidence is to be required to eſtabliſh that point? Not his own teſtimony; becauſe a man cannot be allowed, upon his own claim and aſſertion only, to make his conſent neceſſary to the marriage of another perſon. Or is it to be proved by the filiation, in the manner directed by the act of parliament, for the ſpecial purpoſe of aſcertaining the ſettlement of the child? Suppoſing that this evidence, which the law has provided for the ſpecial purpoſe of exonerating the pariſh, and for that purpoſe only (as far as appears) is to be

borrowed and applied to this purpoſe, it will not anſwer the exigencies of many caſes; it would not in the preſent caſe, where no ſuch filiation has been proved, or, I preſume, can be proved. But, ſuppoſing ſuch filiation, what ſort of paternity is acquired by it? In the language of the ſtatutes, he is ſtiled the *putative* father, he is ſtill recognized only as a father by mere reputation? Is it then to be aſſerted that this right of giving conſent belongs to every father who is ſo merely by reputation? If that is to be admitted, can any thing be more uncertain, any thing more lax, to ſerve as the foundation of a right of this nature? In what manner, and on what proof, is the licence to be granted, if it is not to be granted to every ſuch father? In what way is it to be ſhewn at the time of granting that licence, that he has that popular repute in the requiſite decree? Is the acknowledgement of the party, the maintenance, and education of the child to be called in in aid? If the mere affidavit of the father is not ſufficient for the purpoſe, in what way is that evidence to be obtained?

Or

Or is a licence to be granted, leaving the queſtion of the validity of the marriage open to future diſcuſſion, and to the chance, that if any diſpute ariſes, evidence may be obtained to prove the acknowledgement, the maintenance, and education, and the general reputation? Can ſuch a licence with propriety be granted?

Now let us ſee what are the rules of law upon the conſtruction of ſtatutes in pari materia.

I take it to be univerſally true, almoſt without any exception, that, in all other acts of parliament, the title of father belongs only to him who becomes ſo in the manner known to and approved of by the law. Every other father, in the language of the law, is only a father by repute, of an illegal and diſreputable character, a character not of honour and reverence, but of diſcredit and ſhame. In all other ſtatutes relating to the civil rights of father and child, they are the father and child known to and re-

cognized by the law.——When it is conſidered that this is a ſtatute which gives ſtrong privileges to parents, privileges unknown to the ancient law of the country, what reaſon is there to preſume, that, in this ſingle ſtatute, the words ſhould have a larger conſtruction, in order to communicate ſuch important rights to perſons to whom the law does not in other caſes give any? and who bear the title of parents not as a title of honour and privilege, but of diſcredit and diſability? Nor is it neceſſary on account of the minors themſelves, ſince they cannot fail to find that protection which it has been the wiſdom of the law to provide, in the appointment of a guardian, by the authority of the Court of Chancery.

Attending thus to the univerſal policy and morality of the laws, to their language in general, and to that which is eſpecially uſed in this act, I cannot but be of opinion, that it was the intention of the legiſlature, *dare jure maritis* only, to give a power to lawful parents alone; and that natural parents,

rents, though parents *de facto*, are not the parents intended by the act.

So much for the queſtion upon principles; how ſtands authority upon the matter?

In the firſt place, private authority ſpeaks negatively at leaſt to this effect. Mr. *Juſtice Blackſtone*, it is obſervable, where he treats of the peculiar powers of legal parents, expreſsly mentions this conſent as belonging to them; when he ſpeaks of the power of natural parents it is not then enumerated, though it muſt have occurred to him; and therefore it is to be inferred that, according to his judgement, it is a power which belongs to one deſcription of parents only.

I obſerve, that the learned *Editor* of the laſt edition of the *Commentaries* has laid it down, that it has been decided, "that if a "baſtard marries under age by licence, he "muſt have the conſent of his putative fa-

"ther,

" ther, guardian, or mother, according to " the ſtatute." If the obſervation is to be underſtood according to this arrangement, I cannot agree that it has been ſo decided. For what guardian can be ſo interpoſed between the natural father and mother?

As to public authority, there has undoubtedly been a deciſion of a very high court, which has created the only difficulty preſented to my mind upon the ſubject; I mean the caſe of the *King verſus the Inhabitants of Edmonton*; for the caſe of the *King verſus the Inhabitants of Hobnett*, eſtabliſhed no more than that natural children are within the proviſions of the act. But, in the caſe of the *King verſus Edmonton*, I cannot deny, that the preſent queſtion did ariſe; and I am as little diſpoſed to deny, that the expreſs deciſions of the court of King's Bench, in the interpretations of ſtatutes, even in *re-eccleſiaſticâ*, are authorities of a very binding nature. But I hope, I may, without violating that reverence which I owe to ſuch an authority, permit myſelf to obſerve, that

it

it is a caſe which ſtands ſingle—that it is in that claſs of caſes which are uſually conſidered as moſt open to the reviſion of the court; I mean the claſs of ſettlement caſes; and that a queſtion of the validity of marriage is in that court a queſtion of incident merely; and what has ſtill more importance with me, high as the authority of ſuch a deciſion muſt be, even with all theſe deductions, it is oppoſed by the uniform interpretation of the ſtatute, given by the Court of Chancery ſince the paſſing of the act; a practical interpretation, which has been conſtantly, as I underſtand, acted upon by the interpoſition of its authority, in the appointment of guardians in ſuch caſes. Under this oppoſition of authorities, it will not, I hope, be deemed too much for me to remark, that this court is rather left more to its own views of the ſubject, than if ſuch a deciſion had ſtood without any oppoſition at all.

If then I am called upon to decide this caſe, I have already intimated, that attending

ing to the general policy and morality of the law, to the principles of interpretation, and to the language of the legiſlature in this and other ſimilar ſtatutes, I am led to conclude, that the conſent of the natural parent is not that conſent which this act requires to be given, as eſſentially neceſſary to the valid marriages of illegitimate children. At the ſame time it is proper for the party to recollect, that a different opinion has been delivered upon this point.—It is likewiſe proper that he ſhould be apprized, that in the caſe of *Thoroton againſt Thoroton*, in the court of *Arches*, and afterwards in the *Delegates*, a ſeparation for adultery was founded upon a marriage of this deſcription.—And although that matter of the marriage paſſed ſub ſilentio, no objections to its validity having been pointed out to obſervation, yet, as it was not, and could not be, diſſembled in the libel, I cannot take upon myſelf to aſſert, that it did in no degree fall under the conſideration of the court in the deciſion of that caſe. It will be for the party to apply theſe ſuggeſtions to the ſecurity of his own

own future conduct, as he may be beſt adviſed. But my opinion, on the queſtion brought before me, is, that the marriage is not conformable to the ſtatute, and that it is my duty to pronounce that it is null and void.

FINIS.

## LAW BOOKS.

*Published by* J. BUTTERWORTH, *Fleet-Street.*

1. Dr. BURN's ECCLESIASTICAL LAW, with Notes, &c. by S. Fraſer Eſq. 4 vols. Price 1l. 16s.

2. A COMPENDIOUS VIEW of the CIVIL and ECCLESIASTICAL LAW, in a Courſe of Lectures read in the Univerſity of Dublin. By ARTHUR BROWNE Eſq. Profeſſor of Civil Law in that Univerſity, and Repreſentative in Parliament for the ſame; to which is added a Sketch of the Practice of the Eccleſiaſtical Courts, with ſome Caſes determined therein in Ireland, and ſome uſeful Directions for the Clergy. 2 vols. 1l. 4s.

3. A TREATISE on the LAW of LEGACIES, by R. S. Donniſon Roper Eſq. Barriſter at Law, Price 4s. 6d. boards.

*Speedily will be publiſhed*
*By* J. BUTTERWORTH, *Fleet-Street.*

1. TREATISE on the LAW of EXECUTORS and ADMINISTRATORS, by SAMUEL TOLLER, of Lincoln's Inn, Barriſter at Law.

2. A TREATISE on the LAW of TITHES, with a Collection of all the Caſes determined upon the Subject of Tithes, including a great number (taken from original authentic Manuſcripts) *never before in Print*, by HENRY GWILLIM Eſq. Barriſter at Law.

3. A TREATISE on the Conſtruction of the Statutes 13 Eliz. c. 5. and 27 Eliz. c. 4. reſpecting *Voluntary* and *Fraudulent Conveyances*, and the *Nature* and *Force* of *Different Conſiderations*, to ſupport *Deeds* and other *Legal Inſtruments* in the Courts of *Law* and *Equity*. By WILLIAM ROBERTS, Lincoln's Inn.

*London: Printed by A. Strahan, Law-Printer to His Majeſty.*

Stanford Law Library
3 6105 062 008 433